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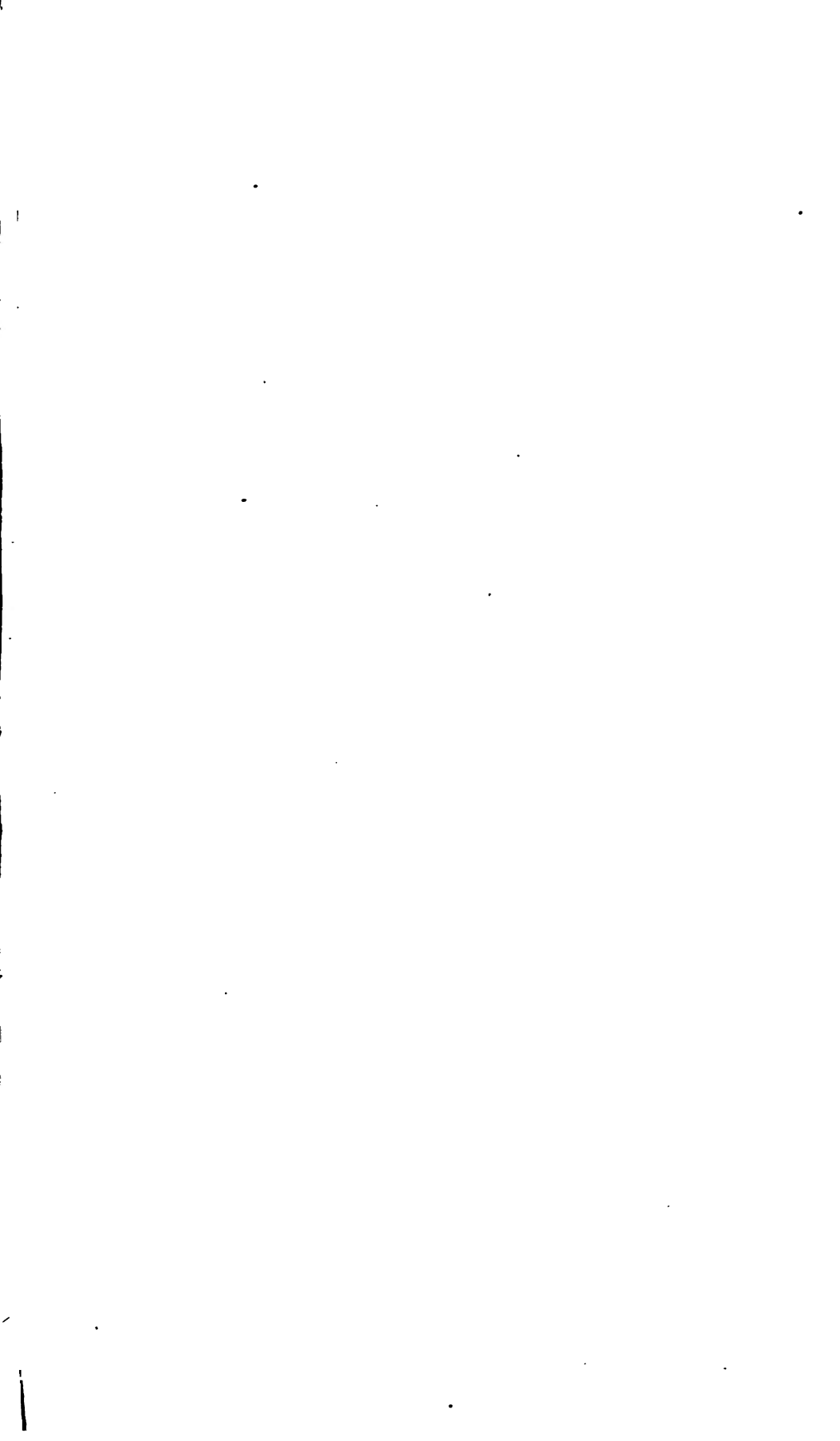
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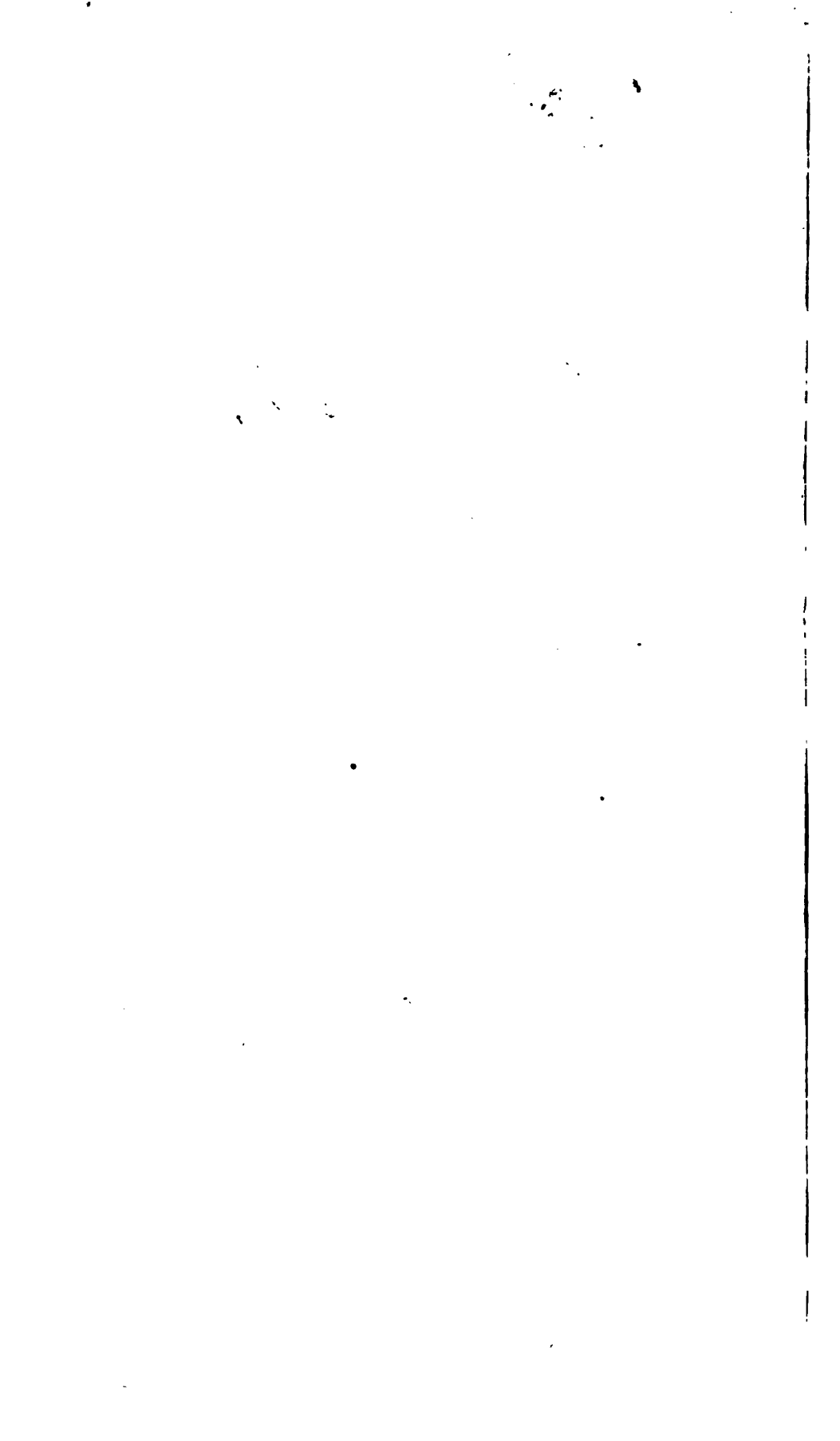
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Frederic C. Nash.



GENERAL ABRIDGMENT

AND

DIGEST OF AMERICAN LAW,

WITH OCCASIONAL

Notes and Comments.

BY NATHAN DANE, LL. D.

COUNSELLOR AT LAW.

IN EIGHT VOLUMES.

VOL. I.

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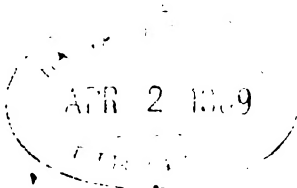
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BOUND

28 MAR 1912

DISTRICT OF MASSACHUSETTS, TO WIT:

District Clerk's Office.

BE it remembered, That on the twenty-third day of October, A. D. 1833, and in the forty-eighth year of the Independence of the United States of America, Nathan Dane, of the said district, has deposited in this office the title of a book, the right whereof he claims as author, in the words following, to wit:

"A General Abridgment and Digest of American Law, with occasional Notes and Comments. By Nathan Dane, LL. D. Counsellor at Law. In eight volumes."

In conformity to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, "An act, supplementary to an act, entitled, An act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching, historical and other prints."

JOHN W. DAVIS,
Clerk of the District of Massachusetts.

CAMBRIDGE:

From the University Press—By Hilliard & Metcalf

INTRODUCTION.

IT is the intention in this introduction, concisely to state the object and plan of the work, the manner in which it has been formed, and the reasons for now publishing it.

At the close of the American revolutionary war, when the United States being an independent nation, it was very material to inquire and to know what was law in them, collectively and individually ; also to examine, trace, and ascertain, what were the political principles, on which their system was founded ; and their *moral* character, so essential to be attended to in the support and administration of this system ; especially in selecting from the English laws, in force in a monarchy, once feudal, those parts of them adopted here, and remaining in force in our republic. With such impressions the author early turned his attention to these subjects, and in good earnest engaged in collecting materials upon them ; and the more readily, as such a pursuit perfectly accorded with his professional and political employments, in which he engaged in the spring of 1782. He early found there was in the United States nothing like *one collected body of American Law, or one collected system of American Politics* ; but all was found in scattered fragments. * Scarcely any native American Law was in print, but the colony statutes, charters, and some of the constitutions. No judicial decisions, made in America, of any importance, had been published, and but very few forms. The law enacted here was found separately published in many States, in Colony, Province, and State statutes. (Our law labored under another material disadvantage ; most of it was found only in English books ; these were written and published to be used in England, not in America ; a large part of which was of no real use here. No measures had ever been taken to ascertain, with any accuracy, what part of English law our ancestors had adopted in the colonies or provinces. * The result was, our ablest lawyers were often unable to decide what parts of the English laws were in use here ; and our students at law, often studied as laboriously the useless, as the useful parts of those laws. No one had attempted to embody our laws or po-

litical principles, dispersed in numerous local charters, constitutions, statutes, and also English books ; many of which laws and principles were to be traced to the free parts of the British system, and even to the ancient Germans, in several cases, and in some to the Hebrews, several of whose laws some of our ancestors early adopted in America. In this state of things, a very important object naturally presented itself to one, who, for several years, had been in a situation highly to appreciate American principles, especially those of the American revolution, which was, a *collected body of American Law*, formed with a constant reference to those principles, and to our character and situation. Forty years ago the materials for such a work were but few, in comparison with what they now are ; and then it was very useful, and even necessary, to collect them for the lawyer's private use ; and to such purpose was the undertaking commenced and pursued many years. The title, "A General Abridgment and Digest of American Law, with occasional Notes and Comments," is intended to give a clear and concise view of the nature of the work. Formerly the word *Digest*, in law books, meant much more than an alphabetical arrangement of marginal notes, or of several indexes. But as this seems to be nearly its modern meaning, it applies but to an inconsiderable part of this work. the principal parts of which are described by the other words in the title, to wit., Abridgment, Notes and Comments. The first object has been to abridge and compress cases within narrow limits, but not so as to lose or obscure the law, decided or settled in them. Next, on proper occasions, by remarks, notes, and comments, to examine and explain a few obscure points of law, and sometimes to show the law is not, as it has been in some decisions stated to be. The work is calculated to consist of eight royal octavo volumes, of about 700 pages each, to be purely American, and among other things to supply the place generally of the English abridgments and digests, now read, especially by students, very disadvantageously, because in many respects inapplicable to our practice. As every lawyer of experience must have found a common life too short to be well read in the immense mass of law and equity, Federal, State, and Territorial, really applicable to our affairs, it must be, in some degree, a waste of time, especially for students and some others, to spend a large part of their time in reading English law as to titles, forest, game prerogatives, ancient demesne, advowsons, boroughs, English copy-hold estates, many parts of feudal tenures, most kinds of English courts and customs, modes of punishments and forfeitures, as to English religion, privileges, revenue, stamps, modes of conveying and assuring property, and a vast many other matters peculiar to England. In fact, near half the English and Irish law we buy, at a heavy expense, and read often to the exclusion of reading

INTRODUCTION.

our own laws, so useful, is as inapplicable to our concerns as the laws of Germany or Spain ; and more so than the civil code of France, since it is adopted, in substance, by Louisiana, one of our States.

Having said thus much as to the origin and design of the work, next it is proper, in a few pages, to give an exposition of it ; and one made sometime since is preferred, because gentlemen, eminent in the profession, after examining the plan, and a large part of the work, thought it was correct.

THE PLAN AND OBJECTS.

1. Though the work is large and expensive, it is not larger than the state of our laws requires ; and including in it only such moral and political principles as are essential in a proper law work in this country. Though it has not been practicable to include in it *local State* law, on a large scale, except as to two States, yet there is included in it enough of such State law, to shew that the several State courts proceed on the same *general* authorities in deciding general questions, whether federal, at common law, or in equity, or even in applying authorities in the construction of state statutes, and especially of devises, conveyances, &c., made under them.

2. It is, exclusively, calculated to be useful to American lawyers, especially to students, and those of the profession who cannot possess many law books.

3. The object is, to make our American charters and constitutions, statutes and adjudged cases, the *ground work*, on each subject : and therewith to incorporate that portion of the English law recognized in the United States, beginning with magna charta, and the first charters and statutes in our Colonies. The *ground work* has been thus viewed, because it is obvious that when constitutions and laws made in our country are not consistent with English law adopted here in practice, the former must prevail and the latter yield. In English law, adopted here, have been included and considered such English principles as have had an influence in our system.

4. Fully to examine such of our laws as are binding on all parts of the Union ; to cite some, the most important, *verbatim* ; and to abridge the others as far as practicable, keeping the work within reasonable bounds.

5. To examine the charters, constitutions, and statutes of the several Colonies and States, of a public nature, and the judicial decisions made in the highest courts in them, and published, so far as to acquire correct ideas of such State law : but so voluminous is it, and so much of it merely local, in small portions of the nation, that it has been deem-

ed not practicable, or useful, to include large portions of it in this work, except in regard to a few of the States; and it has been considered that the Judges and Lawyers of any State best understand its local laws; and it will be found that the courts in one State have not often noticed the laws and decisions in other States.

6. This being the case in regard to State law, it was found best to select the State law of some one State, to be included much *at large* in this work. Accordingly the laws of Massachusetts, in substance including Maine, have been selected for the purpose, and for the following reasons:—1st, These laws are, in fact, the laws of two large States. 2d, With these the author has long been well acquainted. 3d. As the other New-England States were, at first, peopled from Massachusetts, her laws were the root of theirs. 4th, Her laws, as to the rights of persons, property, &c. were made the root, or germ, of nearly all our territorial law east of the Mississippi, by being made the material parts of the ordinance of Congress passed July 13, 1787, for the government of the United States' territories northwest of the Ohio, and from time to time extended to their other territories, as will appear on examining the ordinance itself. 5th, Much the largest part of the judicial decisions made in Massachusetts (and Maine) have been made on those principles of law which are common to all the States, except Louisiana. 6th, Many of the statutes of Massachusetts having been copied, or formed in substance, from English statutes; and many others of our Colonies and States having done the same, her statutes, in these respects, are substantially theirs: for instance, Massachusetts, Virginia, &c. nearly copied their statutes of limitations from the statutes of limitations of the 32d Henry viii. ch. 2. and hence, so far, the statutes of one are those of all. However, there is embraced in this work much of the local law of the other States in the Union, in different ways, especially of New York, Virginia, and Kentucky. The State of Louisiana having, by statute, adopted the new French civil code, with some variations, and made it, of course, a part of our American system, many parts of this code have been taken into this work. In fact, on a careful examination, it will be found that more than four fifths of the decisions made in Massachusetts, New York, and Virginia, stated in this work, have been made on principles and authorities common to twenty-three States, and so practised on in all. Though in the statutes of the several States there is a sameness in principle, yet there is a vast variety in words and detail, when not formed from one source, as above; but not a tenth part of the law in a State is found in its statute books; owing to this variety, the statutes of each State must be used somewhat at large, in order to practise on them safely.

7. There are also included several hundred cases, State and Federal,

reported in manuscripts before 1804, and rather more fully, as probably they will never be found in any other work : these are selections from decisions made, some before 1775, and others after that period to 1804 ; in a large part of which cases the author was counsel, hence was in a situation correctly to understand them. It has been a part of the plan, in considering each subject of importance, first to give a general view of it, under the terms, *general principles*, illustrated, usually, by rules and cases ; then to enter on particulars on the same subject ; believing that in this way the parts of a subject are best understood, and their analogies perceived, especially by students. Having treated a subject, or an important case, in its parts, it has been found useful, if not necessary, to make, in some cases, some remarks, comments, or notes, to explain, not only for the benefit of those who most need explanation, but to caution against admitting judicial decisions as authorities, where the remote principle, on which they are made, is not admitted.

8. It has been another object, to treat a party's right and remedy in connexion ; as, in the same chapter, or article, in numerous cases, and wherever his right and title to property, to things in action, to damages or redress, are investigated by his counsel with an immediate view to the suit or remedy. Hence much of the law relating to such rights and titles is found under the proper action ; as, account, assumpsit, case, covenant, debt, ejectment, &c. ; and when such titles and rights have been of a nature to come under one or another kind of action, the prevailing fitness has been most regarded. The reasons for adopting this course being many, they can be seen but by the work itself.

9. Original authorities have always been preferred, principally relied on and resorted to. Digests and abridgments have been relied on only when found correct, or when deemed to be so, by reason of their agreement with known and settled law in other cases ; but Cruise, Comyns, Bacon, and other digests and abridgments, have been extensively cited, or referred to in the margin, &c. as directing to many good authorities, and as corroborative. Not much reliance has been had on *nisi prius* cases ; nor much on divided opinions.

10 It has been a rule, to abridge, considerably at length, certain leading cases ; as Gelston and Hoyt, Bent and Baker, Freeman and Pasley, Lister and Green, &c. because it has been considered that it is of vast importance that such cases be correctly understood :—to be so, the facts, the points, and decisions must be correctly stated : other cases will appear to be so stated, when not so in fact, because it has been a rule not to divide a case so often as is usually done :—instance, Gelston and Hoyt ; this case is best understood when the twenty or more material points decided in it are examined together ; not when, by an abridger, scattered under twenty or more different heads.

11. It has been another object, to form a general abridgment and digest of American law, calculated to afford a general knowledge of it; and to lead to a more diligent study of it: hence the parts of it are arranged to be studied critically, in connexion with the authorities referred to, as each one may have time and abilities, and most occasion for one division after another; and so to form it to receive additions, without materially disturbing the order of it. For to make such a work permanently useful, law must be added as it shall come into existence, and the plan be so formed as conveniently to receive it. And it is proper that such a work have in it, a material portion of American law on every subject, on which questions in law or equity may arise.

12. It may be understood, that as Massachusetts statutes, State and Colonial, and judicial decisions, occupy their several places in different parts of the work, in relation to Federal law, a lawyer in any other State may, if he choose, substitute the statutes and such decisions of his own State, in the stead and places of those of Massachusetts, when he shall use this work. By Federal law is meant the Federal constitutions, acts of the Federal legislature and of the Federal executive, and judicial decisions thereon; and, in a broader sense, is meant by Federal law, any law that pervades the whole Federal territory, whether of English or American origin.

THE PARTS OF THE WORK, HOW ARRANGED, &c.

Herein the main object has been to avoid two evils in the entire *alphabetical* order—1st, The bringing together to be read, perhaps in the same hour, matters totally disconnected—2d, The entangling the student in his outset, in some of the most abstruse parts of the law. Some parts of the law are connected, either by original principle, or by falling under the same kind of action or remedy, so that they are connected enough to make it some object to read, and especially to study them in connexion, and as forming a division, or branch, of the law of the land.

In the arrangement, it was thought best not to make fewer divisions than 28; as in these, matters fall into one division, connected only by a general principle, as resting on some one kind of contract, or growing out of some one species of torts, or connected only by falling under some sort of remedy or suit; as the action of *assumpsit* or debt;—or sometimes connected by both the principle and remedy, as the fifth division, *assumpsit*. Sometimes the alphabetical order does well enough, as in the order of personal actions, as account, *assumpsit*, case, covenant, debt, detinue, replevin, and trespass. No doubt some would prefer more divisions, as in that of debt, and make four of it, as the grounds of it would direct; but others may think it connexion enough, if the

matters of the division be connected by falling under one kind of action or remedy ; or by resting on some one ground ; or connected by established practice, and the best authors, as general pleadings are ; or if conveniently studied together.

ANALYSIS OF THE TABLE OF CONTENTS.

In this is seen, in detail, the arrangement of the several parts of the work, divided into 228 chapters, the first words in each expressing the subject matter of it. The chapters are generally divided each into articles, and the first words in each article express the subject of it ; and usually each article into sections, and often the first words in the section express the subject of it. So that the matter of each may be readily seen. The 228 chapters contain 1707 articles, and these about 26,000 sections.

As to forms in pleading, a few select ones will be found in this work, and many useful ones referred to, especially in notes of reference at the close of various chapters, many from Wentworth's Complete System of Pleadings (in ten volumes) as it refers to near all the English forms, ancient and modern.

1st Division.—This embraces contracts generally, and the origin, considerations and principles of them, in chapter 1st, considered at large in those parts of the work in which various rights and remedies rest on contracts.

2d Division, Ch. 2.—Various Remedies by the acts of the parties, largely considered on principle, or in detail, under the usual heads.

3d Division, Ch. 3, 4, 5, 6, 7.—Embracing the general grounds and principles of actions in various forms, pursued and explained in detail in subsequent chapters whenever necessary or proper.

4th Division, includes the action of Account, and contracts on which it lies, in chapter 8, as fully considered as is proper in a general abridgment and digest.

5th Division, embraces Assumpsit, and the various contracts on which the action is founded, in chapters 9 to 57. This very large division of the law embraces 49 distinct grounds of action ; that is, simple contracts, applied to so many purposes. It has been found convenient, and no violation of principle, to consider them, generally, in alphabetical order. Though the contracts in this division are many and made to many purposes, and the actions thereon are numerous, they all rest on the same principles ; the general issue, and principles of declaring, are the same in all ; and usually a great part of a young lawyer's business belongs to this division.

6th Division.—This includes all those Torts, which are the grounds of the action on the case on torts, in chapters 58 to 79. After considering the nature of these torts, and the foundation of this action on the case, generally, in chapters 58 and 59, the several subjects are conveniently treated alphabetically; collecting generally the law on such subjects.

7th Division.—This includes Evidence, in chapters 80 to 100; also Demurrers to Evidence, and Bills of Exceptions. Each chapter contains its proper branch of evidence, illustrated by cases considered as largely as is consistent with the nature of the work. After treating evidence on general principles, explained by cases, and somewhat at large in chapter 80, the branches of evidence, as in relation to books, copies confessions, character, damages, deeds, depositions, affidavits, hand-writing, hearsay, &c. &c. are considered conveniently enough in the above order.

8th Division.—This embraces Covenants, and Actions on them, in their numerous branches, as to personal and real property, in chapters 101 to 124; including therein conveyances, in the same deeds covenants are; as the same deed conveys property, and usually by covenants in it assures the property. This division also embraces Seizin and Disseizin, so essential to be attended to in conveyances, and so materially affecting them; also Vouchers on Covenants, and Pleadings peculiar to Covenants and Vouchers.

9th Division, is, as to the various kinds of Estates and Titles to them, in all their usual branches, in chapters 125 to 136, largely considered, on general and common law principles, here recognized, and American statute law, more especially that of Massachusetts and Maine.

10th Division.—This embraces Writs of Error and *certiorari*, in chapters 137 and 138. These go together, and make one division; but quite distinct from every other division, their place in the arrangement is indifferent, as they relate to almost all kinds of actions &c.

11th Division.—This includes the Grounds of Debt and Detinue, and the Actions of Debt and Detinue thereon, whether contracts, judgments, penal statutes, recognizances, &c. and pleadings peculiar thereto. Though debt is founded on all these grounds, yet it is mainly on penal laws, and on acts done in court &c. and before magistrates—largely treated in chapters 139 to 170. The grounds of this action are more various than those of any other; being 1st, penal laws, governed however, as to these, on the same principles: 2d. Contracts sealed, all as to these on the same principles: 3d. Judgments, uniform as a ground of action: 4th. Such acts by a person, who acknowledges himself bound &c. Having in chapter 139 considered contracts somewhat at

large in relation to the action of debt, the several branches follow in the above order, as debt on annuity, contracts, arbitration bonds, awards, &c.

12th Division.—This includes the Action of Replevin, and Trespass *vi et armis*; the various grounds of and pleadings in them; in chapters 171, 172, and 173.

13th Division.—This embraces General Pleadings, in their several branches, suited to our American practice, and Amendments in pleadings, in chapters 174 to 185, including trials and new trials, and the various matters and laws thereto appertaining, according to the usual arrangements. Also stating what pleas are proper in each kind of action, briefly in personal, at large in ejectments and land actions, except some critical examination in regard to writs of right, to be found in division 28

14th Division.—This is as to Pleadings in certain cases, and the grounds and principles thereof; as in *audita quarela*, *mandamus*, *procedendo*, several kinds of *prohibitions*, *quo warranto*, informations, &c. in chapter 186.

15th Division.—This includes the Principles on which the courts of the United States, and those of Massachusetts, and in substance, Maine, proceed, and on which instituted; and their powers and duties generally, from their earliest establishment to 1821; sundry General Principles, and many Maxims of Law, binding on all courts; in chapter 187. As to this subject, it has been found that but little can be written to any good purpose, while the American courts are so often new-modelled.

16th Division.—In this are considered Appeals, in chapter 188; Writs of Review, in chapter 189; Writs of Scire Facias, in chapter 190; Partitions, in chapter 191; and Trustee actions, in chapter 192; and the pleadings in each, the grounds thereof, the laws and matters as to each.

17th Division, includes, in chapter 193, a Synopsis, or summary view of Pleadings in the courts of law and equity, in Civil and Criminal Cases, in 45 articles. This is placed between pleadings at large in civil and criminal cases; perhaps many would place it before either. The real object of it is, to afford the student, in some stage of his duties, a correct view in a few pages of the parts and first principles of a complete system of pleadings, and to aid him in avoiding the confusion in his mind, which an immense number of pleas, and parts of pleadings, naturally produce, when seen but at large, and scattered as they are, in many large volumes.

18th Division.—Contains, in chapter 194, sundry matters in Practice in various parts of judicial proceedings. This head is of modern date;

The author once thought, as he finds some now think, that in a work of the abridged and digest sort, of 5 or 6000 large pages, a great proportion of the local law and equity of every State in the Union, of English ancient law, and the Civil and other foreign laws, might be included ; but experience and reflection are quite otherwise, and evince that these can occupy but a small space in a very large work, unless local, old, and foreign laws be made to exclude laws of general use and application. When we consider that the mere indexes only of the statutes, forms, and decisions, published in our twenty-four States, fill above 8,000 pages, a lawyer can have reflected but little, who shall believe he can publish them to any valuable purpose in one half, or one third of that number of pages. The State law, published forty years ago, did not fill a tenth part so many pages as State law now published fills. And if our law books in the English language only, now increase fifty volumes a year, what will they come to in fifty years more ? If the revision of the Roman or French laws, in each case of a single sovereignty only, was such a vast undertaking, what must be the revision of our laws in some future period ? The laws of twenty five sovereignties, besides an immense mass of imported laws, all increasing.

The work has necessarily been many years in hand, even since its outlines were adopted in 1801, there has been an immense and unexpected increase of American law since that time. Since that period some entire branches have come into existence ; numerous statutes have been enacted, and near all the decisions published in the American reports, and a vast number of English decisions in law and equity have been imported and used. It has been impossible to foresee from time to time the effects, these new and numerous acts and decisions would have on the arrangements, how they would overload some parts, and give to others an ill shape. And it is also almost impossible for any man to keep pace with the increase and changes of American law. In the arrangement, chapters, articles, and sections, have been referred to and relied on in preference to pages. There are two obvious objections in referring only to pages ; one, the paging is often varied, the other, the reference is not minute or particular enough. Also on the plan of chapters, articles, &c. the index, table of contents, and of cases are conveniently formed and used, as the work is in progress, and additions are with facility admitted. This plan is well preserved even where volume and page are added in the references.

The evil to be feared in our country is, that so many sovereign legislatures, and so many Supreme courts, will produce too much law, and in too great a variety ; so much and so various, that any general revision will become impracticable. It may be observed that a complete system of law and equity, best calculated to preserve the power of the

magistrate and the rights of the people, is the last thing men attain to in society. Peter the Great soon understood every thing in the civilized parts of Europe, but the laws ; and because he could not understand them, he never ceased to prefer the despotism of Turkey, " where the judges are not restrained by any methods, forms, or laws." Ancient Greece, though eminent in other sciences, never had such a system. The reason is seen in the almost infinite variety, extent, and combination of ideas, founded in nature, experience, and cultivated morality, so essential in forming and completing such a system. It is very clear that a great republic, in which there is room for talents ; in which thoughts and actions are not restrained by religious or political despotism ; in which education is encouraged, and moral character is esteemed ; in which the law rules, and not the sword ; in which each one asserts his rights by law, and not by force ; and in which there is representation, jury-trial, and a free press, is the natural field of law and equity : but to produce these in perfection, there must be a national character. The rules of law and equity, in important matters, must be uniform, and pervade the whole nation ; for if there be a code for each inconsiderable part, laws, and so law books, must necessarily be so extremely multiplied in the numerous parts, making and executing laws independently of each other, that soon, but few, even of the lawyers, can know what the law is, except in his own limited part, and not even there, if judges allow an inundation of law books, of every kind, to be used in hearing and deciding causes. A serious evil we are fast running into, in most of our States. This inundation of books, made in different States and nations, will increase, until we can shake off more of our local notions. Our true course is plain, that is, by degrees, to make our laws more uniform and national, especially where there is nothing to make them otherwise, but local feelings and prejudices. We have in the common and federal law, the materials of national uniformity in numerous cases. We have a national judiciary promoting this uniformity ; and we have lawyers, learned, industrious, and able, to second this judiciary. We only want a general efficient plan, supported with zeal, energy, and national feelings.

It has been truly said, that law, well calculated to preserve liberty and order, though to be produced with difficulty, " is a hardy plant," and whenever it has once taken root, " will scarcely ever perish through the ill culture of men, or the rigour of the seasons," " as every mortal" has an " interest in its preservation." History and experience prove, that good laws, and an accurate legal style once established in a nation, preserve their character long after every thing else corrupts and decays.

Local feelings and prejudices, are not the only evils we experience ; there is another : rapid changes in the laws. In Massachusetts alone,

since the American revolution, there have been three criminal codes in force, as to all the most considerable crimes and offences.

Some, perhaps, will expect to find in this work, more than there is of our political system, and less of ancient law. It has been an object invariably, to state our political principles, as far as they concern in any considerable degree, our courts of law and equity. But it is considered that the Deity has laid the foundation of society in the *moral feelings*, and in the social inclinations and nature of mankind. On these, every body politic is organized, whenever instituted in wisdom and free choice. The moral and political systems, therefore, in their wide extent, are naturally the subject of a *moral and political* rather than a *law* work; and on this distinction, the American materials, copiously collected, have been separated. As to *ancient* law, found in the books principally used in this work, it will be found to be the sound part of our law, resorted to in well examined causes, by the most eminent judges and lawyers, in England and America; as may be seen in the modern reports. Nor has this ancient been admitted to the exclusion of modern law; but to the enlargement of the work. There has existed another reason for bringing into it much old law. It is still a material part of our legal system, found in numerous books, but a few of which can nineteen judges and lawyers in twenty, ever own or have access to. As to modern books, the case is different; and it is to be presumed that every judge and lawyer will have the statutes and published decisions of his own State. These considerations have had weight. Some seem to think that the Law Registers, Law Journals, local Digests, &c. published in the United States, may supply the place of a work like the present. This is a mistake which will readily appear, on comparing it with them.

Statute Laws of Maine.—In June 1820, and in January, February, and March, 1821, the legislature of Maine revised, or rather re-enacted and new-arranged most of the public statutes of Massachusetts, in one volume, in a series of chapters, from 1 to 180; hence, in citing Maine Statutes, it is sufficient to cite the chapter. These statutes have also been printed by William Hyde in 1822, in one volume, which also contains the constitution of Maine, divided into articles and sections, and an appendix of law, enacted in Massachusetts: this is cited by page. The alterations made by the legislature of Maine, in the Massachusetts statutes, are not many or very material; and principally in conformity to the judicial decisions on those statutes; near all of which are included in this work, and in which the statutes of Maine are referred to. The said 180 acts, the last of which is a long repeating act, are noticed in the following pages.

The laws of Kentucky, are the laws of Virginia, a little varied.

See Toulmin's edition, of 1802, a valuable collection. And Virginia very carefully adopted the laws of England, in force, 4th James I., when Virginia was settled, applicable to her situation. (See the edition of her laws, A. D. 1661, &c. &c.) Hence, usually, in stating the law of either of these two States, we state that of both; and much of both is found in the decisions, as to the District of Columbia; a part of which is mainly governed by Virginia law.

The reader will observe that the chapter and articles, throughout this work, are noted near the top of each page, and in the margin in each, to enable the reader readily to find and chapter, article, and section. So to find any division or matter, each *general* subject, as contracts, assumpsit, case, debt, pleadings, &c. is stated at the top of the left hand page; and each *particular* subject at the top of the right hand page; and he will readily know from what court, country, or State the law is taken, by noticing the authors cited.

As to the inquiry sometimes made, why the publication of this work has been delayed to so late a period in the author's life; it may perhaps be sufficient to observe, that a very large part of our law has in rapid increase, revisions, and alterations, come into existence of late years, and it is now to be hoped that the flood will fluctuate less, after so many revisions of State law, and the change of opinion as to law imported; especially late chancery decisions. On a fair examination it will be found, that no law work in the English language has ever required so much labour, research, and revision, as this has; especially in deciding what law, in a monarchy once *feudal*, is in force in a free republic; what State law, in so many States, is annulled or altered by national law; and which of the authorities on a subject, of late so vastly multiplied, are most to be relied on; or what is the legal result of all, especially when often diverse, and sometimes contradictory. So sensible of these and other difficulties has the writer been, that had his health, and habits of studying closely, failed him, even at the age of sixty-five, there would have been no publication; and now it is essentially influenced by the opinions of others highly estimated.

When a work so large, and in some measure *sui generis*, is offered to the gentlemen of the profession, and so formed as to be examined as a whole, in order to judge of it correctly; and this cannot be readily done, nor until after all the eight volumes shall have been published, it has been obvious that some other mode must be adopted, to enable them more expeditiously to form opinions of it, though not so perfect as such examination. This secondary way is found in the opinions of eminent men, well known, given of it; who have actually examined large, and different parts of it. Thinking this second method important, as others often have, in Nov. 1819, this undertaking was submitted to the ex-

amination of an eminent judge, well known in all parts of the Union, who examined the general plan, and divisions 8, 9, 10, 23, 24, 25, 26, & 28, and some other parts, in all about one third of the whole. His opinion, given in May 1821, (lately published at large) is, in substance, that the titles he examined "exhibit a far more complete and methodical view of the law, than the corresponding titles of any abridgment now in general use;" "and that it will peculiarly facilitate the labours of students in the profession." In June 1822, the important chapter on insurance was submitted to a gentleman of the law, on account of his superior knowledge of the law on that subject; his opinion (so lately published) is in substance, that "within his knowledge, there is no digest of the law of insurance, equally compendious, so useful as this chapter will be to the profession;" that "the division and arrangement of the different subjects appear to be methodical and perspicuous;" "principles, upon which the cases in the several points depend, are concisely and clearly stated," and his opinion, that "all the cases of any importance, which have been decided by the courts in England and the United States, are quoted, and most of them either judiciously abridged, or the points stated." And it is now to be clearly understood that the parts, not so examined, have been as faithfully executed as those that have; and since it was, in November 1819, so submitted, the author has diligently laboured on it, near four years.

On the whole, all will agree that a large work of this kind is wanted; that but few lawyers will engage in such undertakings, and none eminent as speakers, or always crowded with business. In this enterprise, the object has been invariably to serve the cause of American law. Having thus proceeded, a publication being much urged and sufficiently encouraged; and very liberally, where he had practised law in Massachusetts and Maine; he now submits his labours to a learned and liberal profession, sincerely wishing this first essay to form a general, abridged, and digested system of American law, on a large and national plan, wherein many intricate parts are examined, may in time, lead to one more perfect. Hoping this introduction and the body of the work will satisfy all who shall examine it, and the existing and past condition of our laws, it is not published until after every effort has been made to render it useful, especially to the junior part of the profession, most of whose libraries are necessarily small.

INDEX.

THIS short Index, with the aid of the Table of Contents that follows, will enable the reader conveniently to find the most material matters, prior to printing a copious Index in the last volume.

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▲

General Abridgment OF AMERICAN LAW.

CHAPTER I.

CONTRACTS AND CONSIDERATIONS.

ART. 1. **I**N this chapter the nature and principles of contracts will be briefly considered ; and contracts in detail will be considered, and the actions founded on the various species of them, in a large proportion of the following chapters.

Sect. 1. What is a contract. The best and most comprehensive definition found is the French, derived from the civil law, which is defined thus, "a convention by which one or more persons obligate themselves to one or more other persons to give or do, or not to do, something." Blackstone defines a contract, which usually conveys an interest merely in action, thus : "an *agreement*, upon sufficient consideration, to do or not to do a particular thing." This contract is merely *executory*, on which there is a right of action to enforce an execution of it. But a contract may be *executed*, and then it is a *grant* ; as if A agree, or contract, for a proper consideration, to sell a piece of land to B, and make the conveyance ; here the agreement, bargain, or contract is *executed*, and thereby the land is vested in B and the consideration in A, and no cause of action exists. If A shall attempt to use the land as his, B can repel him by shewing their contract executed. Mr. Powell thinks a contract is best defined thus, "a contract is a transaction in which each party comes under an obligation to the other, and each, reciprocally, acquires a right to what is promised by the other." After all, we can properly understand what a contract is, but by seeing its obligation on one party and its security to the other, in the thousands of cases in which it is used

CH. 1. in all the conditions of mankind. What is a contract, *the*
 Art. 1. *obligation of which our state legislatures cannot impair*, is
 ~~~~~ one of the most important questions in our system; and this  
 contract well understood is among the best securities in it; not  
 only as to *property*, but as to rights and privileges also, as we  
 shall see in many cases. A judgment is not a contract.

§ 2. *The several kinds of contracts.* They are, commonly,  
 considered, 1. Matters of *Record*, as a recognisance. 2. *Spe-*  
*cialties*, as deeds under seal, as to which no consideration need  
 be stated or proved. 3. *Unsealed written* contracts. 4. *Parol*  
 or *verbal* contracts. Some, of these three classes of contracts,  
 make only two. 1. *Specialties*. 2. *Parol*, and they say if *writ-*  
*ten* and *not sealed* they are *parol* agreements. 3 John. Cas.  
 60; but, in fact, the statute of frauds and many judicial deci-  
 sions (as we shall see) make as strong distinctions between  
 written and parol contracts, as the common law makes be-  
 tween sealed and unsealed contracts; and the civil law made  
 a clear distinction between mere *verbal pacts*, or agreements,  
 and *written stipulations*. 5. Many acts passed, grants made,  
 and corporations created by our legislatures, are *contracts*, not  
 to be annulled or altered by them, without the consent of the  
 other party, holding a private right, interest, privilege, fran-  
 chise, or exemption under them. 6. Contracts as above are ex-  
 ecutory and executed. 7. Contracts are *express*, as in express  
 words or in writing; or *implied*, as when raised by law. 8. Treaties,  
 likewise, are contracts of the highest order; obligatory on one  
 party, whenever they stipulate and promise rights, privileges,  
 exemptions, power, interest, or property to the other. 9. Our  
 Colony charters were viewed as political contracts; hence in our  
 separation, we found it necessary to "*dissolve the political bands*"  
 which connected them with their parent state. So the articles of  
 confederation were viewed as *political contracts* among the states,  
 called a *Confederacy*, to which there were, at first, thirteen parties.  
 Not so the *Constitution* of the United States, but the people of them  
*ordained and established* it, in whom was the *original* sovereignty,  
 and who included in one body all classes, and they have carried  
 it into execution by electing a part of themselves, from time to  
 time, in states and districts, to administer it according to the  
 rules of conduct *ordained and prescribed* in it, not as a *contract*  
 among thirteen, twenty, or twenty-four parties. So where the  
 people of a state have formed and adopted a state constitution,  
 they have as *one people ordained and established* it; their  
 electing men in towns to frame it, or their meeting in their  
 towns to ratify it, has not made it a *contract* to which each  
 town is a party; hence from the ordaining power being one  
 body, results the right to alter and amend as a portion of them,

short of the whole, sees fit ; 10, so we shall observe, in subsequent chapters, there are several kinds of contracts in regard to time, number of parties, and amount of consideration : some must be for life, and life only ; some temporary and some perpetual. These are some of the great divisions of contracts into those of several kinds ; as to the *objects* and ends to be obtained by contracts, and as to the *subject matter* of them, contracts are of so many sorts, as to be the grounds of more than half of the actions that exist.

CH. 1.

Art. 1.

§ 3. *The probable origin of contracts.* They must have commenced with human society. The obligation of contracts must have been felt in Adam's family. Men by nature being inclined to associate, they, no doubt, associated as soon as two or more of them existed, and, probably, there never was a time when men did not want to exchange labour and commodities in some sort of society ; and as soon as they felt this want or inclination, agreements and contracts became necessary. The property of the commodity, the right of the service of one, in *war*, might be acquired by another by force ; but in peace, neither could pass but by contracts. Before written contracts were invented and formal ones introduced, exchanges must have been made, and rights to property and labour yielded and acquired by mere agreements, proved by no other evidence than the delivery of the thing, or by the yielding of the service, or by calling some bystander to witness the bargain :—as every individual had occasion for agreements, he became concerned in rendering them valid, and so useful. There was a common interest in supporting them. It was with money as with writing, neither could ever be the invention of a rude and barbarous people ; still before men had either, they must have had much occasion for agreements, not only in borrowing and lending commodities, and in exchanging them, as also labour, but even in a traffic of labour for the fruits of the earth, for animals, and other things, understood to be the objects of ownership. The right of *meum* and *tuum* was, *intuitively*, perceived, as soon as men perceived at all, as it ever has been by children in the cradle. If ten men from ten different nations meet, accidentally, on a desert island, and one of them, by his labour, acquire a fish from the sea, they all, intuitively, perceive it is his. This has ever been the case, and it has ever been the intuitive perception of mankind, that when one, by his exertions, has obtained property or a right, it has remained his, until he has lost it either by a non user or misuser, or yielded it by his consent, and with this consent, contracts have been coeval.

CH. 1. ART. 2. *Nature and forms of contracts and agreements.* § 1. A

Art. 2. contract is nothing more than an *agreement reduced to writing*, though we often speak of *parol* or *verbal* contracts. Strictly speaking, while terms settled by the parties rest in words only, they constitute an agreement; when that is reduced to writing, it becomes a *contract*; and that, when sealed, becomes a deed; and though the substance, reason, and intent of every one is thus the same, namely, *to secure a right*; and the main question, on each, is and must be the same; that is, *what did the parties mean, what right did they mean to secure*; yet as the rights of property and of persons, and the wants of mankind are almost innumerable, and these are to be secured or supplied, mainly by their contracts, these, to answer their various purposes, must, necessarily, be almost infinitely various in forms and terms, as the wants to be supplied, or the property or service to be transferred, rendered or received may require; and the different forms allowed by law even to effect the same purpose, very much increase the variety.

§ 2. A proper *consideration* is the basis of each contract or agreement, and if such a consideration is not expressed, understood, or implied, there is no contract the law will enforce. Fraud renders every one null and void, tainted by it. And no fraud is so covered or protected in equity, and even at law, as not to be inquired into. *Security* is the end of every contract and agreement, but the particular object to be secured by any particular one, is a creature of the moment. But if executed, it secures a right or interest only to be defended. No action will be necessary to recover it. If *executory*, or *to be executed*, the act to be done, usually falls into some known class; as to convey lands or goods to one or to many, for years, for life, or in fee, by delivery, by deed, or by will, &c. to serve as an apprentice, a sailor, or a servant, &c. to pay wages, freight, insurance and the like: so the law and practice, usually introduces and settles certain well known forms of contracts, adapted to each description of acts to be done by force of them. Hence each species of formal contracts is settled with reference to the thing to be done, and the kind of acts, the one to be done, belongs to; and so is the law and practice, generally, in regard to acts stipulated not to be done. Therefore, it is that each species of formal contracts has its own peculiar properties, separately to be considered in the subsequent pages; and each generally will be considered as the ground of action, and as the security of rights; and the nature of the actions and proceedings in them will accord with the kind of contract of each description. But there are certain general rules as to considerations, construction, &c. common to all of them. As all contracts must be valid or invalid when made, they can never



depend on *after contingencies*, except the taking effect of one may be suspended until an event shall happen, but this event, or fact, must be such as would have made the contract complete, if existing when made. And this event must happen in legal time.

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§ 3. *The amount or adequacy of the consideration.* Although as between the parties to a contract the law does not weigh the quantity of the consideration, but deems a peppercorn sufficient in a contract of any amount, yet the law is otherwise as to third persons, (and equity is clearly so,) who are affected by the contract, as creditors of the contractor, and fair purchase of the same property. As to them there must be a consideration reasonably adequate, as a fair price honestly paid; and even between the parties, at law, the smallness of the consideration may be evidence of fraud, or of imposition, or of undue advantage taken. Indeed, the mere inadequacy of price, alone considered, and as no evidence of mistake, misconception, or undue advantage, does not weigh, but if this inadequacy be considerable, as half the value only, &c. it is held even as between the parties as sufficient evidence of misconception or undue advantage. See *James or Jones v. Morgan*, and *Heathcote's case*, ch. 139 a 7, 2, 3; 2 Pow. on Con. 154 to 161, ch. 32 a 13, 2, and sundry cases there cited.

§ 4. *What is a private contract, and so a private right or property, which cannot be taken away by legislative power.* There have been no rights in our country so often invaded, for near two centuries, by numerous legislatures, as the rights secured by *private* executory contracts; that is, *debts owed*; and privileges secured by private charters in the nature of contracts: under the pretence of the public good, and to favour embarrassed debtors, these rights and privileges have been often attacked and violated, notwithstanding all the charter and constitutional provisions introduced in better times, to protect such rights and privileges: the direct tendency of such measures has been to deprive individuals and private corporations of their property and privileges, and to produce express provisions against their repetition; therefore, in July 1787, Congress unanimously introduced into the ordinance for the government of the Western country, the following clause: to wit, "and in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or to have force in the said territory, that shall in any manner whatever, interfere with, or affect *private contracts* or engagements, bona fide, and without fraud, previously formed." Soon after, a clause more concise, and of broader meaning, but of the same spirit, was made a part of the Federal Constitution, and adopted by the American people without opposition; as

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to the ordinance, the question has been, what is a *private contract* ; as to the constitution, what is a *contract*, a state legislature is not allowed to impair. On this subject will be found in the subsequent pages some of the most important judicial decisions in our country.

It has been correctly observed, that this clause includes the word *contract*, generally : and that it cannot be confined (as some urge it must) to bills of credit, ex post facto and tender laws, because these are *expressly* provided against in the same section ; the only reasons recollected for not giving the word "*contract*" its usual meaning in this section, that is, as meaning a convention to do or not to do something. There are two kinds of *private contracts* ; 1, those made by *individuals* and *private corporations* ; 2, where the public, as the state, is one party, as when it creates a corporation to hold and manage *private property*, or funds for private, or even general *charities*, as for the benefit of an *indefinite* multitude, whether persons infirm, poor, to be instructed in literature, civilized, christianized, &c. Here is a *contract*, and the incorporating power is merely a party to it, and cannot alter it without the consent of the private donors, or of those they entrust to manage and apply their funds in the manner settled in forming the body politic. These considerations lead to the material distinction there is, in the fifth place, between incorporations for *charitable* and *political* purposes. When created for *political* purposes, as counties, towns, &c. the incorporation is a mere organization of *political* powers, as a part of the public government. In such cases the incorporating power enters into no *contract* ; so far is not a party to one, but may alter and modify, at discretion, as the practice invariably has been. A statute, in such cases, incorporating a town, or any body politic, really a part of the political government of the state or nation, is not a *contract* or grant, but the statute enacts a *law*, *ordains and establishes a rule of conduct*, alterable at the discretion of the incorporating power, still this power may vest in towns, &c. rights it cannot vary, as for instance, a corporate capacity to purchase, hold, and sell lands, and in this capacity a town actually holds lands ; as to these there is a *contract*, for there is an implied engagement by the incorporating power, not to touch these lands without the town's consent, except to tax them. This engagement results from the spirit of the government, whenever one of its principal objects is to protect and secure private property and rights to their legal owners ; and whenever the incorporating power is not despotic, but is only a power delegated by the people with restrictions, the safeguards of private right and property.

**ART. 3. The execution.** §1. Every exchange is executed at the time the verbal agreement, or written contract, is carried into execution, and has its effect ; and, therefore, can never be the object of legal compulsion. None can be the object of this compulsion, except those made to secure the performance of some *future* act ; and then, in the nature of things, to *convey or transfer property*, as lands or goods ; *render services*, or *pay monies*, in fixt or reasonable quantities. The intent of every contract is the same, that is, to bind one party to transfer or pay, and to give the other a right, in law, or equity, to enforce the performance, so that he shall receive the money, or effects, according to their meaning.

§ 2. When one detained the goods of another, and which the latter had a right to have, the first and obvious remedy was, an action of debt or detinue, wherein the plaintiff stated his right to the thing, which he alleged the other unjustly detained : if goods or debt the defendant owed as the *representative of another*, he was considered as *detaining* the one or the other, or if he owed the debt *himself*, in his *own* right, he was viewed as *owing* and *detaining*, and to be called upon to render what he *owed* and *unjustly detained*. Hence, there has ever existed, in different nations, the distinction between charging one in the *debet* and *detinet*, and in the *detinet* only. In a larger sense, a man may be bound to pay in *money*, *property*, or *labour*. Before money was used, he could be held to pay but in the two last, but since the *general measure* of all property, an acknowledged currency, has been used, payment has been understood in a more limited and appropriate sense, as a payment in money. The precious metals properly stamped, have most generally been adopted as this common measure. When a common representative of all property and services is thus established, it usually becomes the course of business, for the proprietor to sell the one, or yield the other, for a quantity of these metals, he is to receive of the purchaser, at the time, or afterwards, as the just equivalent for the thing parted with. This quantity must be fixed by the *parol agreement*, or *written contract* ; or it must be a reasonable quantity left to be ascertained by third persons, referees, judges or jurors. Where one agrees to pay the other a *certain* sum, as the price of labour or goods, a *debt arises*, and the payer is a debtor and the receiver a creditor. And the latter in an action of debt, recovers this precise sum ; and often with damages for the detention of it, after the pay-day fixed upon, or after a legal demand of payment, where no such day is named. But when the sum is not thus fixed and certain, nor capable of being reduced to a certainty *by calculation*, made on given data, but *sounds only in damages*, the creditor does not recover a *debt*, but only

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How far acts of incorporation are contracts, &c. See Corporation, especially ch. 143 a. 3.

## CONTRACTS AND CONSIDERATIONS.

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damages (and costs;) therefore, when the party agreeing or contracting to render to another, lands, goods, or a reasonable sum of money, fails to perform, the other can only sue for and recover damages to be fixed by a jury. In expounding a *contract*, the place where made must be considered, unless the parties have a view to another government, as when a bill was drawn in *France*, payable in *England*, it was held that it was governed by *English* law, because, originally intended to be carried into effect in England, but *secus* if payable in France. This rule applies to the nature and construction of contracts, not to the mode of enforcing them. Hence a contract made in Madeira under Portuguese law, between two Portuguese subjects, where a debtor's *body* is not liable, was enforced in N. York by her law, and the debt held to bail. 2 Johns. R. 198, 220, Smith v. Spinolla, and cases cited 7 John. R. 117, 118.

1 W. Bl. 259.  
Robinson v.  
Bland.  
Cooke's B.  
Law 373.  
522—2 H. Bl.  
553—8 Johns.  
R. 169—2 Bl.  
Com. 442—1  
Com. D. 411.  
—Co. L. 172.  
—Aliens.—  
New. on Con.  
L. 31, 32.—  
Co. L. 2.  
Idiots, &c.

ART. 4. *Contracting parties.* § 1. There must be two at least; and these must be *able* to contract either *expressly* or by *legal implication*. Their contract may be *executed*, as where two agree *to exchange horses*, and do it immediately, this conveys *a chose in possession*, and is like a grant that transfers the right and possession together; or it may be *executory*; as if they agree to exchange next week. This conveys only *a chose in action*. Here the *right* only vests. It is of the very essence of a contract to the parties *consent*. To this end they must have a *physical, a moral power* to do it, and a free exercise of this power, and actually exercise it in deed, or in contemplation of law.

§ 2. Hence *idiots, lunatics*, and persons *non compos mentis*, or *distracted*, not having reason to assent, cannot contract; and their contracts are void *ab initio*; and may be shown to be so on the general issue in some cases, and in others on special pleading; but if a man be legally *compos mentis*, be he wise or unwise, he is bound by his contract; yet, however, if a contract be obtained from a *weak* man, by any fraud, practice, breach of trust, or unfair means, it may be avoided, not on account of his *incapacity*, for the law deems him *capable*, but by reason of this practice with him, which is considered as *evidence*, and often, as *proof of deceit and imposition*: and in weighing the evidence the judges will notice that *less art will deceive a weak* than a *sensible* man. A *feme covert* has no power to contract, or assent, and her contract is wholly *void*, except in a few special cases, in which the law allows her to act as a *feme sole*, or as under the protection of the court. Persons under *duress* cannot contract or assent. If *minors* contract, *except for necessities*, they may avoid their contracts, or confirm them when they come of age. (If a contract be void or only voidable is yet unsettled in several cases.)

In what  
sense. See  
Baron and  
Feme.

§ 3. Their assent may be given, *expressly*, by words or by signs, or *tacitly*; but it is a maxim in law, that no assent be inferred from a man's *silence*, unless; 1, *he knows his right and what is doing*; and 2d, unless his *silence* be *voluntary*. It therefore follows, if I know one is conveying my property to another, and I am *voluntarily silent*, I may be barred; for the law, in this case, may presume my assent; but this presumption, like every other, may be rebutted by evidence; and when parties assent, it is not material how the matters assented to, be placed in writing; therefore, they may assent to a whole bond or deed, and make it binding, when at the time of the signing a part of it is written by, or in a memorandum, on the back of it. But some exceptions are made by the statute of frauds, &c.

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Art. 5.

Assent to contracts.

8 T. R. 483,  
or D. & E.  
Burgess, Pres-  
ton.

ART. 5. *Matter of contracts and agreements.* § 1. It is a settled principle that one must have an *actual*, or *potential* interest in a thing to be able, by his contract, or agreement, to convey it, or dispose of it. If I own a piece of land, I can sell the grass that will grow on it next year; because I have it *potentially*. But I cannot sell the future crop of land I do not own. I cannot sell what I *shall* buy. I have it not myself, and I cannot convey what I have not. I neither have it *actually* nor *potentially*. But I may by an *executory* contract, covenant, or engage to *buy and convey the land*; but this cannot enable the other party, *legally*, to recover the land; but only *damages*, if I fail to perform. So if I have only a *condition*, I cannot contract for the property or possession; as if I sell a ship to B, on *condition* he pay me \$1000 in three months, I cannot, in the mean time, sell her to another; for I have only a *condition*, and such a sale is bad, though he fail to pay; that is, if I contract with C, in the mean time, that he shall have her at such a price, if B do not perform, and he does not, and I do not fulfil my contract with C, he can only have an action for damages against me for not performing, but never can recover the ship herself in replevin, or otherwise, as he would be able to do if my contract with him sold and conveyed the *property* of the ship to him—See below. And in every contract of sale it is asserted to fix the price. 14 Vesey 400. When the parties in any case reduce their contract to writing, all their previous parol agreements are viewed as included in it.

So was the civil law.

*Potentia propinqua.*  
Potential interest.

Conditional interest.

§ 2. *Possibility.* There are three kinds of possibilities; 1, a possibility coupled with an interest; this may be devised, transmitted, or assigned, as an interest one has by *executory devise*, this too will pass by descent; because the person has an interest in the lands known in law: so in *contingent, springing*, and *executory uses*. 2. A bare possibility, or hope of succession, as of an heir, *living his ancestor*; this cannot descend, nor can it be assigned, devised, or even released: the utmost

2 Day's Ca.  
137.—3 T. R.  
88, 98,  
Jones v. Roe.  
—1 Burr. 228.  
—4 T. R. 39.  
—5 T. R. 618.  
—10 Mod.  
419 to 426.—  
3 T. R. 41.

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Art. 6.

6 Wood's  
Con. 22, 23,  
551.—Co. L.  
72.—10 Co.  
49. case of  
Lampet.—  
Fearn 58.  
8 Co. 96.—  
2 Bl. Com.  
173, 290.—  
2 Cro. 693.—  
1 Com. D.  
654.—Gilb.  
124.—5 Bac.  
378.—Co. L.  
264.—Shep.  
238.—Stran.  
70, 132.—11  
Mod. 168 to  
163.—2 Wood  
158.—3 East  
120.—3 Wood  
515.—4  
Wood 43.—  
But. Fearn  
401, 415,  
548.—Cro.  
El. 316.—5  
East 162.—  
6 Cruise 623,  
624, &c.,  
Thellusson  
v. Woodford  
4 Vesey jun.  
227 to 243.  
6 T. R. 320.  
—10 Mod.  
412.

See Cutler  
adm. v.  
Powell.

4 Co. 123.—  
Beverly's  
case, but 3  
Day's Ca. 90  
held that  
such a person  
may avoid  
her own  
deed.—See  
the reason-  
ing, ch. 35, s.  
6.

the heir can do, in respect to this, is to release to the tenant of the land, *with warranty*, and so *bar or rebut himself by his own warranty*. 3. A *possibility*, a *mere contingent interest*, as a devise to A if he survive B; here is a *mere contingency*; and any estate A may have depends on a *condition precedent*, and if he die before B, nothing vests in A or goes to A's heir; nor has A any interest he can *devise or assign*, or any way transfer by his contracts. But this *possibility* A may *release to the tenant of the land*; as the *wife's possibility to dower* may be *released*, living her husband; as was decided in the sixth and seventh points in Lampet's case, 10 Co. 48. So a *term for years* is granted to A *for life*, remainder to B; B living, A has but a *mere possibility*, a *mere contingent interest*, and is good only if A die before the term ends, in the use or term itself; but during A's life B's *executory interest* cannot be granted to a *stranger*; but this *possibility* may be extinguished by a *release to him in possession*: the reason is, the grant to a *stranger occasions suits and contentions*; but the *release to him in possession extinguishes them*; and the many cases on this litigated point, seem to be reducible to this one principle; the *release* is good, and extinguishes the possibility, when made to one, who has an *interest in the thing*, in which the possibility is absorbed, whether in possession, remainder, or reversion, in privacy, or otherwise; because in either way the *possible interest is absorbed or extinguished*, and being so, it cannot be the ground of litigation, as it might be, and often would be, if the law allowed it to be transferred to a *stranger*.

§ 3. So in *personal matters*, if a master agree to pay his mate \$200 wages, provided he *proceeds, continues, and does his duty* from one port to another, as from *Jamaica to London*, and the mate dies on the passage, his administratrix can recover no part of the sum, or any wages; no interest could pass from the deceased mate to her as his representative, because none ever vested in him; but to the vesting of any, there was a *condition precedent*; to wit, his performing the voyage; nor had he any, he could, by contract, have assigned. No limited number of lives on which an *executory interest* vests. 4 Vejejun. 313.

ART. 6. *Privies*. § 1. Contracts, in many cases, are materially affected by *privacy*. In *Beverly's case* it was resolved that a deed of a person *non compos* is *voidable*, yet he himself shall not avoid it; but that his *privies in blood*, as his *heirs*, or by *representation*, as *executors* or *administrators* might do it; but not *privies in estate*, as he in *remainder or reversion*, is to *tenant for life*; nor in *tenure*, as the *feudal lord* was to the *tenant* of the land. The reason is, a man's deed or contract is his mere *personal act*; it binds him solely, because it has his *legal assent*, ex-

pressed or implied. Without it, he cannot be held to yield a right ; and without this assent a right secured to him, by the contract, cannot be released ; and being, in *toto*, *personal*, none but such as represent the *person*, can avoid or confirm. By this implied personal assent, one partner binds another in a partnership contract ; the wife the husband ; and the servant the master, by a contract made by his *implied* consent. If two take a bond ; and one release it, the other is barred on the same principle ; because by *voluntarily* joining, this power is, impliedly, given to each by the other. But if *by law compelled to join*, as in *audita querela*, and in some other cases, the release of one has no such effect, because here, the joining being thus by *legal compulsion*, there is no room for such implied assent or to presume it. On this distinction is *summons and severance*, in actions, founded ; therefore, if two or more *voluntarily* join in taking a contract, and one will not proceed in an action upon it, he cannot, by law, be severed ; but if by law two or more are obliged to join in a suit, and one will not proceed in it, he may be severed by *summons and severance*, and the rest proceed without him ; but there is no *summons and severance*, where all need not join. 10 Mass. R. 136.

§ 2. *By privity of contract*, a release to one obligor is a release to the other, or to all in the bond ; because here the creditor releases all his right by discharge to one debtor, and another may get it and plead the release. The privity among the debtors is in their being bound and united, and jointly, in one *entire debt* ; however, in some cases, one may be discharged and not the others.

§ 3. So where several are interested in one *entire* thing, or estate, there is a *privity of estate*, and they are privies ; and a deed to one may be pleaded by another ; as a release to one joint-tenant, or partner, may be pleaded by another. It operates on the *thing*, and one interested in it may use it ; as one in remainder, or reversion, may plead a release or confirmation to tenant for life, and *e converso* ; the same as to an heir, executor, guardian and ward, lessor and lessee.

These are a few of the material principles in *contracts and agreement*, in the English and American laws, which will be often considered, more minutely in the following pages, as different subjects, to which they relate, shall come into view. And an entire contract, illegal and void in part, is so in the whole, and a contract must be proved as laid in the plaintiff's declaration.

ART. 7. *Of dissolving contracts.* § 1. It is a settled rule, that with as high a degree of force, or validity, as a contract receives in its formation, it must be dissolved ; and according to the Roman rule, *unumquodque dissolvi eo ligamine quo liga-*

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Art. 7.

Toller's L. of  
Ex. 446.—3  
Bac. Abr. 33.

Cro. Cas. 420,

How a release, &c. to one privy in estate affects another.

8 John's R.  
253, 254.

2 Wils. 376,  
Rogers v.  
Paine.  
Unum quodque dissolvitur,  
&c.

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6 Co. 44,  
Blake's case.  
4 Mass. R.  
443, Kelle-  
ran v. Brown.

Civil law.—  
French law.

Contracts in  
different  
countries.

3d book, title  
2, in art. 1 to  
234—title 3,  
art. 1 to 20.  
Institutes.

The same in  
the laws of  
Louisiana, p.  
260.

*tur.* On this principle a deed must be discharged by *deed*. Hence a discharge in the nature of a release, *without deed*, in satisfaction of all demands, cannot be pleaded in an action of covenant; *for covenant by deed must be discharged by deed*. This rule holds, whenever the deed or contract *itself* is to be released, discharged, or dissolved; but not when *damages* arising out of it are to be released or discharged; for a *writing without a seal* cannot operate as a defeasance, so as to make a mortgage of a deed absolute on the face of it, in *law*, though it may in *equity*.

§ 2. *Every payment supposes a debt*, and if any thing be paid not due, it may be demanded back, but not as to moral obligations, *voluntarily discharged*. A contract may be discharged by every one interested in it, such as a co-obligor, or surety, or by one not interested, if he act in the debtor's name to make a valid payment and discharge, he who pays must own the thing given in payment, and have a power to alienate it. A payment made to one who has no power to receive for the creditor, is valid, and discharges the debt if ratified by him, or if the thing come to his use.

§ 3. *As to the principles of contracts in the civil and other laws*. Perhaps the principles of contracts, as found settled in the *civil* law, and in the laws of some of those European nations, which have more strictly followed the civil or Roman law, will be observed to be, in some cases, nearer the *moral sense* of mankind, than those of the English laws, though the difference will not be found to be considerable. In some cases it may be found we have adopted the principles of the *civil* law, where the English have not. Hence the principles of contracts, following, are extracted from the French code revised, and published about 1805 and 1806, and these will be found to have been collected, almost *verbatim*, from the Roman or civil law. These principles, in general, being founded in the moral perceptions of men, are such as are recognised in all civilized nations, with but few exceptions.

§ 4. In the French law a contract is defined to be a convention, “*par laquelle une ou plusieurs personnes s’obligent envers une ou plusieurs, à donner, à faire, ou à ne faire quelque chose.*” The conditions of which are; 1, the consent of the party binding himself; 2, his capacity to do it; 3, an object certain, that forms the matter of the contract, and 4, a legal cause of the obligation. But there is no consent, if given by mistake, or if it be obtained by violence or deceit; but then the error must be in the substance of the thing itself which is the object; and violence avoids the contract, though used by a third person, and it is violence when, of a nature to inspire a reasonable person with the fear of exposing himself,



or estate to a considerable and present evil ; and in this case, respect is to be had to the age, sex, and condition of the person.

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§ 5. But a contract cannot be impeached by reason of violence, if after it has ceased, the contract is, expressly, or tacitly approved, or if the legal time allowed to except to it be passed.

§ 6. "*Le dol*," or deceit, avoids a contract when so practised by one party, that without this, the other, clearly, would not have contracted ; but deceit is always to be proved.

§ 7. Every one may contract, if not declared by law to be incapable ; and one of ability to contract cannot allege the incapacity of the party with whom he contracts.

§ 8. The *mere use*, or *mere possession* of a thing may be, as well as the *thing itself*, the object of a contract.

§ 9. An obligation, without cause, or grounded on a false or illegal one, is void : and an *implied* contract is as valid as an express one. The cause is illegal, when prohibited by law, or is contrary to good morals, or the public order.

§ 10. An obligation to give, implies a delivery of the thing, and a duty to preserve it till the delivery, on the penalty of damages to the creditor.

§ 11. No damages are due to the creditor, or contractor, till the contract be broken. They are, generally, when broken, his loss sustained, and gain thereby deprived of, but such only as are the *immediate and direct* consequence of the non-execution of the contract.

§ 12. When it is expressly provided for in the contract, that the party failing to execute it, shall pay a certain sum in the name of damages, and interest, that very sum must be paid.

§ 13. The construction is upon the whole contract, and what is implied is to be taken into view, as much as if expressed. See 14 Mass. R. 453—455, as to doing a seaman's duty.

§ 14. *Conditions*. Every condition impossible, or contrary to good morals, or prohibited by law, is void. And a condition not to do a thing *impossible*, avoids not an obligation in which it is contained. Every condition is to be performed in the manner the parties really meant it should be. When an obligation is made, depending on a future uncertain event, or on one that has actually happened, though not known, the thing contracted about remains at the debtor's risk, who is not bound to deliver it, but on the happening of the condition. If the thing entirely perish without his fault, the obligation is extinct. If damaged without his fault, the creditor has his election either to dissolve the contract, or to demand the thing, in the state wherein it is, without diminution of price. If the thing be damaged by the debtor's fault, the creditor has a right to dissolve the contract, or to demand the thing in the state in which it is, with damages and interest.

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§ 15. *Contracts in the alternative.* In these, the debtor or contractor is at liberty to deliver *one of two things*; the election is his, if not expressly given to the creditor; and he may deliver either to the creditor, but not a part of one, and a part of the other. This contract is single, if one of the two things cannot be the subject of the contract; and the contract is binding as to the other.

§ 16. If one cannot be delivered, because perished by the fault of the debtor, he cannot offer the price in its stead; if both perish, and one, by his fault, he must pay the price of the one that perished last. If one perish without the debtor's fault, the creditor ought to have the other.

§ 17. *In the contrat solidaire* there is something not found in our law. It is a contract among many creditors, when one of them, expressly, has a right to demand payment of the whole, and this payment made to one of them discharges the debtor; and it is at his election to pay either creditor, if not prevented by a suit of one of them. The release, made by one of them, discharges the debtor, but for the part of the releasing creditor. Every act that interrupts the prescription, or limitation, as to one of them, benefits all the creditors. On the debtor's part the contract is *solidaire*, when several are bound for the same thing, so that any one of them may be compelled to pay the whole; and the contract may be *solidaire*, though one of the debtors be bound differently from another, in regard to the same thing; as one *conditionally*, and another *absolutely*, one to pay *immediately*, and another at *some future day*. This kind of contract can be only by express stipulation. If the thing perish, by the fault of one or more of the debtors *solidaires*, the other debtors are held to pay the price of the thing, but not damages and interest, the creditor can demand damages and interest only against the debtors by whose fault the thing perishes, and those "*en demeure*." The suit against one debtor interrupts the prescription as to all, and a demand of interest against one of them, causes interest to run against all of them. There are many other peculiarities in this species of contract, some of which might be useful in any country, especially if one creditor becomes executor; so of one debtor, it does not affect the contract as to the others, nor does a composition as to one debtor.

§ 18. *Penal contracts.* If the contract be void, the penal part is, of course; but the contract may be valid, though the penal part be void; nor is the creditor bound to demand the penalty, which is never incurred till there is a failure in performing the contract.

§ 19. *Payments valid by the Civil Law, &c.* See discharge above. A payment in money, or other thing, *consumed by use*,

cannot be demanded back, from the payee, who has consumed it, *bonâ fide*, though made by one not the owner, and not having power to pay.

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§ 20. Payment *bonâ fide*, may be to one in possession of the security ; but to a creditor, incapable of receiving, is invalid, at least if the debtor do not prove the thing paid has turned to the creditor's benefit, who can never be obliged to receive any thing, but that which is due or stipulated for ; the thing offered being of greater value makes no difference : and though a debt be divisible, a creditor cannot be forced to take a part of it ; and whoever claims the execution or discharge of a contract has the *onus probandi*.

§ 21. *Payment by whom directed, by the Civil Law.* If the debtor owe two debts, he has a right to declare which of them he pays ; but if a debt on interest, he cannot, without the creditor's consent, apply the payment to the principal. It is first applied to the interest. When the debtor owes divers debts, and has accepted an acquittance, by which the creditor has applied what he has received to one of them, specially, the debtor cannot then apply the payment to a different one, at least, if there be no deceit or surprise on the creditor's part : but when the acquittance makes no application of the payment, it is applied to the debt, the debtor is most interested in discharging among those due ; and if some be not due, to those due, though these be the least burdensome.

§ 22. Whatever discharges, or benefits, the principal, does the surety, but not *e converso*.

§ 23. *Limitations* run not in case of violence, but from the day it ceases ; nor in case of error, mistake, or deceit, but from the day it is discovered ; and in general, in regard to married women, minors, &c. but from the day the inability is removed, on the general principles of law.

§ 24. *Implied contracts.* Some of these result from the authority of law only ; others from personal acts. The former are *involuntary*, the latter result from *quasi contracts*, &c. or "*des quasi contrats, or des délits ou quasi des délits.*" The *quasi contracts* are one's own acts, purely *voluntary* ; whence there results some engagement to a third person, and, sometimes, a mutual one between two parties. When one, voluntarily, conducts an affair, the proprietor knowing it or not, he tacitly engages to continue the business he has begun, and forward it till the proprietor can manage it himself ; and if he die before it is finished, till his representative can take the direction of it ; and he is bound to conduct the affair with all the care of a good father of a family ; yet the circumstances that may have led him to engage, may authorise the judge to moderate the damages and interest, that result from the fault

CH. 1. or the negligence of the undertaker. And when he has conducted well, the owner ought to fulfil all the engagements, the  
 ART. 7. undertaker has contracted in his name, and to indemnify him as to all his personal contracts ; and to reimburse him all the useful and necessary expenses he has been at.

§ 25. He who receives, by mistake, or knowingly, what is not due to him, is under an implied obligation to refund to him of whom the thing is unduly received—so if one, by mistake, believes he is debtor and pays the debt, there is the like obligation to refund ; but this right exists not when there is a recovery by suit—so if one wrongfully receive, he is impliedly bound to restore as well interest or profit, as the capital. If the thing so received exist, he is bound to restore it in kind ; and its value if it exists not, or has been damaged by his fault. If he *bonâ fide* received it, and has sold it, he shall be held to restore only the price it sold for. And he to whom the thing is restored ought to account to the *bonâ fide* possessor for all necessary and useful expenses incurred to preserve the thing.

§ 26. *Delicto et quasi delicto*. Whenever I, by my act, and in any degree by my fault, injure another, I am under an implied obligation to make him reparation ; so if by my imprudence or negligence ; so if done by any one for whom I am responsible. The father, and after his death, the mother is responsible for damages done by minor children living with them ; so as to masters and servants, and those one employs, unless it be proved they could not hinder the act ; the same as to animals one has in his care. So the owner of a building is responsible for the damages caused by its ruin, when it happens in consequence of a default in supporting it, or by a fault in the construction of it.

§ 27. *Difference between morality and law*. In some special cases the *law of the land* and *morality* are the same, when this law has for its object, solely, reason and conscience to guide, but differs when policy, or arbitrary rules must, also, be regarded. “ *Virtue is alone the object of morality*”—but this law has, also often, for its object, the peace of society, and what is practicable : Hence, though every *lesion*, or undue advantage in a bargain, to the hurt of another party, practised by one, is an act of injustice in the eyes of *morality* ; yet it is not the mean of restitution in the eyes of the *law* ; because, often, impracticable in every minute degree. The French have a maxim that “ *La vertu est objet de la moralité la loi a plus pour objet la paix que la vertu.*” The law of Rome provided that if the price of a thing the parties agreed on, was less than half the real price in common opinion, the seller might rescind the bargain, but the Roman lawyers differed as to the principle. Some thought the smallness of the price,

was evidence of *deception* or *fraud*, others not ; but that the rescinding was in virtue of a positive rule of law. The French civil code and the French lawyers seem to have adopted the same grounds and principles, making, instead of half, seven twelfths of the price, the rule ; but in neither law had, or has the buyer the benefit of *lesion* ; because it has been said he is, generally, at liberty to buy or not ; probably, the necessity some are under to buy, in all events, provisions in times of famine, sieges, on journies, medicines in sickness, &c. has not been deemed to be sufficiently frequent to justify the allowing the benefit of *lesion*, or of avoiding oppression in buying ; after all it is difficult to see why this benefit should not have been extended to buyers as well as sellers.

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Thus far, 3 to 27, both included, is extracted from the laws of Rome and France ; we have adopted the principles of the *Roman law*, as to the descent of estate to *all the children equally* ; there are these and many other reasons for our studying those laws, existing here, that do not exist in England. See Louisiana.

§ 28. In the construction of contracts, it is Paley's idea " that every contract should be construed and enforced according to the sense, in which the person making it apprehended the person in whose favor it was made, understood it." Whether this manner of construing contracts be strictly legal or not, it clearly is well calculated to preclude evasion in many cases.

Paley 136.—  
2 Bos. & Pul.  
168.

§ 29. As to the *meaning* and *intent* of a man's contract, it must be construed according to the law of the country where made, but as to the *enforcing* it, according to the law of the country where it is enforced or sued, or " the *lex loci* applies only to the nature, validity, and construction of contracts, and not to the *form* of the action, the course of judicial proceedings, or the time when the action must be commenced."

Chitty 81, 82,  
83.—2 Mass.  
R. 84, Pear-  
sall, &c. v.  
Dwight.—  
8 Johns. R.  
189, 194.

§ 30. So a contract may be construed according to the subject ; as where a father covenanted, on the marriage of his daughter, to pay her and her intended husband £20 a year, it was held to be during their lives ; as it must be intended a provision for their support ; and thus the meaning of the parties is often collected from observing what they ought to have understood when they contracted.

§ 31. This was *assumpsit* on a promissory note dated March 7, 1812 ; plea, it was made on Sunday ; held to be no objection, but the contract was adjudged good.

10 Mass. R.  
312.—Geer,  
plt. in E. v.  
Putnam.

§ 32. In making contracts, the maxim *caveat emptor*, applies only to real estates.

§ 33. *Contracts in equity*, &c. General principles ; 1, courts of equity must view contracts within their jurisdiction, sub-

As to these  
matters in  
Equity, see  
and Equity.

the cases in detail found in the index, Chancery

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stantially, as courts of law do : for as neither can make a contract for the parties, and in construing them in each event, there is the same material rule in every case : that is to find and go by the meaning of the parties making them. Therefore Judge Lyon well observed, that “ neither a court of equity nor a court of law can vary men’s wills, or agreements ; courts should endeavour to understand them truly, but not to extend or abridge them ; they cannot control a law-contract nor relieve against damages.” But in proving them, equity often applies to the consciences of the parties, and that sense of truth so widely implanted, that but few can deny it, or assert a falsehood, without showing a consciousness of guilt : but the law cannot often make such application. The equity principle evidently gives hardened, unprincipled men the advantage, who can deny or conceal the truth, or assert a falsehood, when for their advantage, without a blush ; and even when they do this, they get the truth from their honest opponents and avail themselves of it ; were such unprincipled men numerous, probably this application would not be resorted to. There are other material differences in treating contracts in courts of equity and of law, some of the most material will here be noticed ; and as, in a vast majority of cases, contracts are the same in law and equity, to every material purpose, the best way is to notice the most material cases in which they differ ; and where they agree the law governs.

§ 34. A second case of difference is very material. In equity when a thing is contracted to be done, it is viewed as done ; as if A contract to convey a house to B, equity, before a conveyance is in fact made, views it as B’s house to all intents, a house he risks, may sell, devise, or mortgage ; on which A’s debts are no lien, and on B’s death, is his assets, and descends to his heir. On the same principle money contracted to be invested in land generally, is considered as land, and descends to the heir, as land does. In law there is no such principle ; but in this case the estate remains A’s ; and this singular notion exists in equity, only when the contract to convey is completely valid and such as a chancery court will decree to be fully executed by an actual conveyance. Hence equity views the estate as the law does, if there be infancy, dower, or other cause to obstruct this mode of conveying property, as will be explained in future chapters.

§ 35. Equity views a *feme covert*, in regard to her separate property, as a *feme sole*, (see also Baron and Feme, ch. 19) and so allows her, when it appears to be her intention, alone to dispose of or to charge it. The law is different. Not so in Connecticut. 1 Day’s R. 221, ch. 19 a. 1.

§ 36. A fourth difference. Equity fully allows the assign-

ment of a *chose in action*, and the assignee to sue in his own name in equity ; the law does not do this, but in virtue of some statute (see also *chose in action*, ch. 24.) So equity relieves against *penalties* and *forfeitures* in contracts, when the law cannot without statute provisions (see also Damages, ch. 28, and Penalties, &c. ch. 148.)

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§ 37. A fifth difference. Equity examines and weighs the *adequacy* of the consideration of contracts much more accurately than the law can, especially of instruments under seal. (See ch. 32 a. 13, 2.)

§ 38. A sixth difference. Though equity will not set aside or rescind contracts *fairly* made, or *merely because unreasonable*, between the parties, or fairly made between parent and child just come of age ; so guardian and ward ; so contracts between master and servant ; or attorney and client ; nor on such *mere relationship alone* ; yet equity looks with a suspicious eye on these contracts, where undue influence naturally exists on one side. Hence on such slight evidence of it as the law cannot act upon, equity will set them aside (see many cases collected by New. On Con. 445 to 458, and cases he cites, as 2 Atk. 85, *Tendril v. Smith* ; 1 P. W. 639, *Blunden v. Barker* ; 3 P. W. 156, *Howe v. Wyatt* ; 3 Ch. Ca. 117, *Osborne v. Chapman* ; 2 Vesey 259, *Oldham v. Hand* ; 1 P. W. 118, 120 ; 1 Vesey 379, 400 ; 2 do. 549, 627 ; 9 do. 292 ; 6 do. 278, 279 ; 2 Atk. 25, 159, 258, 295 ; 2 Vesey jun. 199, 203 ; 1 Bro. C. C. 369 ; 4 do. 245.) And equity extends like attention to sailors' contracts, and other cases in this work ; so equity relieves against a legal right arising on the contract. 2 P. W. 191.

§ 39. A seventh difference. In many cases equity holds the heir and remainder man to convey lands, on the ground the ancestor, or life tenant's contract to convey is a lien on the land, and passing with it, to the heir, or to him in remainder ; not so by law. On the other hand, equity sets aside the unequal contracts of heirs, disposing of their expectancies, where the law cannot ; and allows a *non compos* to stultify himself ; where it cannot relieve, it decrees a re-conveyance. 2 Cruise 49 ; other cases Kirby 185, 356 ; 1 Day's Ca. 107, 156.

§ 40. An eighth difference. Equity examines parties to contracts, and corrects their *mistakes* in them, or rescinds, or sets them aside in many cases, in which the law cannot ; as where there is no evidence of fraud or contrivance in making them. And so if a party cannot exactly fulfil his contract, or convey an estate in the condition he has contracted to convey it, equity minutely finds the difference, and if small, &c. awards a *compensation for it*, and decrees a conveyance and acceptance thereof, (but none if the wrong description be an object of

CH. 1. sense) 6 Vesey 675, *Druse v. Hancock* ; 1 Vesey jun. 221,  
 Art. 7. 226, *Calcraft v. Roebuck* ; 10 Vesey 505, 510, *Dyer v.*  
 Wargrave ; 13 Ves. jun. 77 ; 14 Ves. jun. 144, *Fenton v.*  
 Brown ; 1 Andr. 80.

§ 41. A ninth and most material difference. This is in the *enforcement of specific performances*. Instead of this the law always gives damages for the breach of contracts. But this power to enforce is limited. 1. Equity cannot interfere with contracts completed, where there is a clear, certain, direct, and expeditious remedy at law. 2. It is limited to *executory* contracts, for as to those *executed*, equity can only rescind them. 3. This enforcement as to time has been much limited ; as late as Lord Coke's time it was zealously resisted by the courts of law on the ground, among others, the contractor had, or meant to have, *his election* to perform, or to pay the damages, and that this election was taken from him when compelled specially to perform ; and they asked to what purpose then was the action on the case or of covenants. 4. It is limited to the *purchases of lands*, or to things that relate to *realties*, and extends not to *personal* property, not even to the funds, except where the contract is incomplete, and not suable at law, or where it is to indemnify, and cases of *quia timet*, and where legal suits afford but an inadequate remedy. 5. Extends not to the *reality*, where an adequate remedy is at law ; never to contracts complete to repair, as on these there is such a remedy. (See also ch. 225.) 6. Extends in the *personalty*, as an exception to the general rule above stated, in a few cases where a legal remedy exists, but is *defective* ; as cases of contracts, which at law produce a circuitry of action, or for settling accounts. 7. Equity never enforces the specific execution of contracts, uncertain on the face of them, because they do not shew what rights are to be enforced ; nor 8. Contracts not mutual, (see New. on Con. 151, 153,) nor those tainted with fraud or contrivance, partaking of champerty or maintenance, as equity never so enforces but to do equal justice ; nor 9. Unless the plt. proves the very contract on which he founds his claim in his bill. This enforcement is always at the discretion of the court.

§ 42. A tenth difference material. Equity allows no *estoppel*, (the law does many, as ch. 160, &c.) but moulds contracts to answer the parties, real intentions, especially as to future generations.

§ 43. An eleventh material difference. When A obtains a contract of B, and he denies its validity, the law inquires no farther than *fraud* extends, or as to *mistakes* or *misrepresentations* that materially affect the parties' rights ; but equity push-

1 Vern. 227,  
 Phillips v.  
 Burks.—3  
 Atk. 382.—  
 3 Ves. 168.—  
 2 Bro. C. C.  
 328.—Pr. Ch.

588.—1 Bro. C. C. 372, 440.—6 Ves. 467 ; 1 Ch. ca. 71.



es its inquiries much further, even to faults not punishable, to antipathies and friendly regards; as if A wishes to purchase B's estate cheap, and knows B dislikes him, and will not sell it to him even for its full value; A employs a friend to buy it, who pretends he purchases for one B greatly regards, and to oblige him is willing to sell it to him under its value; the conveyance is contracted for accordingly; equity ascertains all these facts and refuses to decree a specific performance. In fact equity seems to require all that fair conduct and open dealing, and pure morality do, and extends its inquiries accordingly; in other words, in its narrow sphere of action, *equitas de minimis curat*; in its broad sphere of action, *lex de minimis non curat*.

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§ 44. A twelfth difference, and a very material one. Equity leaves *all criminal* proceedings, and *all crimes and offences* to the law courts; so in general all *maritime* and *military* matters, and all matters whatever to other courts older than that of equity, in all cases in which right and justice can be well and timely administered. Yet English equity in this very circumscribed jurisdiction in a few centuries, has, gradually, got within its reach, and under its thumb most of the property of the nation; and to examine equitably, and often morally, into most of the civil conduct of men in their dealings in it, and as they rapidly spread out, the opinions and decrees in equity evidently become more heterogeneous, various, and often contradictory, and the evil, if it be one, is much increased by the numerous reports of late years, of *mere hints*, and *obiter dicta* in courts of equity, and those too of an inferior judge as well as of the chancellor, an evil almost as great as that of the thousands of *nisi prius* opinions lately reported. Thirteenth material difference. Equity allows a man who agrees to purchase, and possesses and improves, for his permanent improvements, in many cases where the law does not. Sugden 424, 426, and cases.

§ 45. *Some leading principles as to contracts in equity.* A letter or any writing signed by the party to be charged, or such letter or writing clearly referring to a paper not signed, is a compliance with the statute of frauds, provided each contain *the precise terms of the contract*, ch. 11 a. 8, ch. 114 a. 27, &c. and is actually signed; this it must be. 1 P. W. 770; ch. 11 a. 6, s. 16.

§ 46. Though equity does not (as the act does not) require any but the party to be charged to sign such writing, yet equity will not enforce a contract signed only by the party applying for its specific execution, for this is no evidence the deft. called on to perform the contract ever made it; and the case is open to the very evil the act was intended to prevent; and it is hardly

2 Ch. Ca. 164,  
Hatton v.  
Gray.—1 Eq.  
Ca. Ab. 20,  
Hall v. But-  
ler.—1 P. W.  
770, Haw-  
kins v.  
Holmes.—  
a. 6, s. 25.

1 Vern. 221, Cotton v. Lea.—Ch. 225,

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2 Bro. C. C. 564; and Ch. 11, &c. *Simon v. Motivos*, 9 Ves. 234.

to be conceived how a doubt once existed on this point ; where equity enforces parol contracts *partly* performed ; a good rule.

§ 47. Though the statute does not require the power to the party's agent to be in writing, yet equity requires that the fact of the agency to make the contract and sign it, distinctly appear ; and the power given must be strictly pursued ; and the agent's clerk may sign, if assented to by the principal ; 1 Vesey 292 ; Amb. 495, *Daniels v. Adams* ; 1 Atk. 497 ; but in no case is the principal bound beyond the power he gives.

2 Eq. Ca. Abr. 43, *Chamberlain v. Chamberlain*.—  
2 Free. 34.—  
Sundry cases

§ 48. A matter will be decreed in equity to be performed, though there be no writing, if the party to be charged, by his *fraud* or *contrivance*, prevents the writing, as if a father be about to secure certain legacies by his will, and his son, heir, and executor say to him if he will not do it, he, the son, will pay them ; he is bound, and equity will oblige him to pay them. Sundry cases : 2 Eq. ca. abr. 43 to 52 ; 2 Vern. 506, *Oldham v. Litchford* ; 1 Vesey 123 ; 3 Bro. C. C. 400, and ch. 93 a. 3, ch. 225 a. 7.

2 Vern. 456, *Foxcraft v. Lister*.—Pr. Ch. 519, 561, 566.—1 Vern. 151.—9 Mod. 37.—Bro. C. C. 417.

§ 49. Equity decrees *parol* agreements to purchase or lease lands, to be performed, when proved, and followed by delivery of possession, by improvements made, or monies expended by the lessee, &c. on the premises ; ch. 11 a. 9, &c. 2 Freem. 268, 6 Vesey 470 ; *secus* as to a mere holding over, 3 Vesey 379, *Wills v. Stradling* ; this, and if barely delivering of possession be doubtful, either is valid with laying out monies *under the terms of the contract*, as in each case there is part performance ; also it is the lessor's or grantor's *fraud* to stand by and see his estate improved, and then plead the statute. *Earnest* has no effect as to lands (only as to goods) on the 4th sect. of the act ; some cases otherwise ; see *Earnest*, ch. 11 a. 2 ; ch. 225 a. 6, s. 25 ; 1 Phil. Evid. by Dunlap, ed. 1820, p. 510.

§ 50. Though equity will not admit *parol* evidence to vary the written contract, yet it will admit the deft. to show that by *fraud* or *mistake* the one stated by the plt. did not embrace the real intentions of the parties ; this evidence is not admitted to vary the contract in writing, but to rebut an equity. The statute does not exclude any exception that before existed. The deft. before and since the act passed, had and has had a right to say that the written agreement is not the one he intended to sign ; *Joynes v. Statham*, fully stated ch. 122 a. 2, s. 9, 10, and other cases there ; also parol evidence ch. 93 ; New. on Con. 204 to 211 ; and *Legal v. Miller*, at large. ch. 11 a. 10, s. 1 ; but some cases in which the deft. was compelled to perform a contract different from the one he signed ; New. 251, 252 ; but 253, 254, a better rule, as in *Lord Stanhope's* case, in which he contracted for an estate *tithe free*, and was

compelled to receive one subject to tithes ; cited 6 Vesey 678 ; **CH. 1.**  
7 Vesey 270. **Art. 7.**

§ 51. This preliminary sketch of principles and cases in equity has been introduced since 1801, when equity decisions in America were of but little importance, which since have vastly increased. Such principles and cases, therefore, will be considered in detail, in a considerable degree in several parts of this work relating to contracts and proceedings in chancery. Except in chapters 225 and 226 especially appropriated to them, they will be found in chapters also embracing matters in law in several instances. Law and equity in the United States are, in no small degree, mingled together, often in the same cause ; except in two or three states, in the same volumes ; and in several states, especially in Pennsylvania, Massachusetts, &c. equity is, frequently, administered by law courts and jurors. And in New York now, equity powers may be by the legislature vested in the circuit judges (in 8 circuits) and in the county courts, or such other subordinate courts as the legislature may direct, subject to the appellate jurisdiction of the chancellor. So in the highest and lowest courts in Virginia, law and equity powers seem to be blended in the same hands. In this work the object has been and will be, to adopt the English system of equity as far, and as far only, as it has been adopted by the highest authorities in our own country ; a system highly valuable when we separated, (July 4, 1776,) and for some years after, but which now subjects a vast proportion of English property to almost total uncertainty, and lately induced one of the eminent men of England to observe, " it is a disgrace to the nation." This uncertainty is owing to several causes, but mainly to a vast number of volumes published since our separation, containing numerous decisions on equity principles, made by different men, repeatedly variant and often contradictory. Still worse, these volumes, many of them the productions of inferior lawyers, are replete with *obiter opinions, dictums, seems soes, leanings, inclinings, &c.* not only of high judicial officers, but, also, of inferior ones. Though this trash, (so the sound law of the land views it,) in fact, is no rule of property or conduct, yet it has a great influence ; ignorant and indolent judges catch at it ; and counsel, engaged in bad causes, seize on it, and with much ingenuity make a great deal of it ; a similar pernicious effect have the hasty *nisi prius* notions, of late years published by wholesale. It requires not the spirit of prophecy to foresee that in no very long period, the rules of property must become as uncertain, in such a state of things, as in the most despotic governments. If the minute and peculiar features of each new case must be allowed to produce new rules of property not known in law,

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and against law, where is such an equity system to end? It is also absurd to publish thousands of mere dictums and leanings, &c. when there are published more legal decisions of high and full courts, than any man can read to good purpose. As to equity cases, they have become almost infinitely numerous, and but a small part of them are of much value, or use in the United States; hence they are in this work very briefly stated, except Federal cases in ch. 225. But references to equity cases are very numerous, so that when one shall have occasion to use or study them, he will find them largely referred to; and if each equity case be decided on the minute and peculiar circumstances of it, equity cases must increase a vast deal more than law cases, and when each case is so decided it can be of but little use in other cases; cases in law, and especially in equity, varying as human faces vary.

ART. 8. *Considerations when good or not.* It has already been observed, that contracts and agreements affect almost all the concerns of men with each other; and that the basis of each one is a *proper consideration*. It is so as well in a *moral* as a *legal* view; for either on moral or legal principles, this consideration is the *cause* or *motive* that induces a man to act, and to bind himself, by his agreement or contract; and morality no less than law, decides that men ought not to act or bind themselves to do this, or not to do that, without reasonable motives or causes moving them so to do. So is the experience of mankind; for in no age or country has a rational man been expected to act without a reason, or to make promises or engagements, without motives, reasons or causes, or in other words without a proper consideration. If, as to this, there has been any difference in the eyes of morality, and in the eyes of the law, it has been, merely, as to the quantity or degree of this consideration. In some cases morality may measure its adequacy more nicely than the law does, as the law considers it impracticable to measure it very accurately; but natural affection will not support assumpsit, nor will love between the sexes. A *written* promise requires consideration as much as a *parol* one.

2 Day's Ca.  
24.—Powell  
on Con. 330,  
368.—3 Bos.  
& P. 247 to  
256, Vennal  
v. Adney.—  
10 Johns. R.  
249, 250.—  
3 Bl. Com.  
258.

§ 1. The law, founded in reason, will not enforce a promise made by one, or imply he makes one, when there is no *lawful sufficient consideration*. It is intended in the residue of this chapter, briefly to examine when there is or is not, this consideration; and, generally, it must be a benefit to the deft. or a trouble or prejudice to the plt.; and the law holds a consideration sufficient, which is a legal inducement to one to make the agreement or contract. Hence one's being a member of a society is a sufficient consideration for the law's implying his promise to pay a judgment rendered against him.

2. Lord Mansfield, in this case said, "where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made; *a fortiori*, a legal or equitable *duty* is a sufficient consideration for an *actual* promise. Where a man is under a *moral* obligation, which no court of law or equity can enforce, and *promises*, the honesty and rectitude of the thing is a consideration; as if a man promises to pay a just debt, the recovery of which is barred by the statute of limitations; or a man, after he comes of age, promises to pay a meritorious debt contracted during his minority, but not for necessities; or if a bankrupt, in affluent circumstances after his certificate, promise to pay the whole of his debts; or if a man promise to perform a secret trust, or a trust void for want of a writing, by the statute of frauds." See 1 Hen. and Mun. 213; 3 do. 144 to 199.

§ 3. By the law *merchant*, want of a consideration is no *essential* defect in a contract. While a note remains between the maker and payee, it is governed by the civil or municipal law, and the want of a consideration is a clear bar to recovering any thing on it, on the ground it is *nudum pactum*; but when third persons become fairly interested in it, it is not open to this objection; because after it is negotiated, its operation is governed by the same law as a bill of exchange, which is the law *merchant*. Exceptions if negotiated after due, &c. Powell on Con. 341, see Art. 46; Chitty on bills, 3—the contract being in writing does not make a consideration unnecessary; 1 Caines R. 387; 4 Johns. R. 235, 236, 296, 304.

§ 4 So wherever a man is bound, in *honor and conscience*, to do a thing, and promises to perform, he is held to do it. But another principle, also, is to be regarded in considering the foundation of contracts; in forming and enforcing which, no man, *against his will or consent*, or in other words *without his request expressed or implied*, is to be laid under an obligation to perform, by reason of an act of another. But a stranger to the consideration cannot have an action. 1 Stra. 592.

§ 5. In this case it was decided, that a mere general promise, *without benefit* to the promiser or loss to the promisee, was a *nudum pactum*; as a past consideration, &c. 2 Strange 933.

§ 6. If one promise to pay for goods delivered to a third person, it is good at common law, and on the statute of frauds, if in writing; but where *one* undertakes to pay the debt of *another*, the action will not lie, if the consideration be past at common law, nor if not in writing, by the statute of frauds.

ART. 9. "The law does not measure the *quantum* of the consideration;" therefore, "the least spark of a consideration will be sufficient." As when A gets a judgment against B, and Sturtin's case.—Cro. Car. 70, 77, Rolle v. Thorp.—Pow. on Con. 343.—3 Wood's Salk. 387.

CH. 1.  
Art. 8.

Cowper 290, Hawkes v. Saunders, and 1 Esp. Ca. N. P. 279, 723.—1 Stra. 237. Cro. El. 741, Barker v. Halifax, is the principle of the Civil law. Dig. 44, 7, 10.—Dig. 12, 1, 14.

[Nuda pacta, are found in the civil law, also in Bracton.]

Submission to arbitrators is a good consideration for a note.—3 Caines R. 166.

Crow v. Rogers.—3 Burr 1663 to 1676, Pillans and Rose v. Van Murop and Hopkins. Same case 2 Morg. Ess. 69, 86.

3 Burr. 1663 to 1676.—Cro. El. 67, Con. 223.—

CH. 1. gives me a power of attorney to sue it to my use, and C in  
 Art. 12. consideration I will forbear to sue it, promises to pay it, his  
 promise binds him. Though the law will not weigh the *quantum* of the consideration, or on account of its smallness as a consideration, view the contract as void, yet the smallness of the consideration may often be taken as evidence of *fraud* or *deception*, or of some clear mistake in the bargain, and so be the means of avoiding it on this ground. A penny will raise a use, so will a pepper corn reserved in a lease.

Imp. M. P. ART. 10. *The suspension of the plt's right any time is a*  
 161. —2 Bl. *ground of promise.* § 1. If, therefore, A owes me a debt, and I  
 Com. 446.— agree not to call on him for payment *ever so little a time*, at  
 1 Bac. 170. B's request; and he promises to pay it, and thereby I am induced so to suspend it, B is liable.

1 Esp. 88. § 2. And if the act be done *at the request* of him who makes the promise, it will be a sufficient foundation to engraft the promise upon, as the shewing a deed, &c.; but not if the request be made by the advice or influence of the other party; as if I persuade a sailor to resolve to have a protection, and he requests me to procure it for him, he shall not be held to pay me for my trouble in getting it, *for I drew him in to make the request.*

Yates 3 Burr. ART. 11. *Any damage to another, or suspension, or forbearance of his right,* is a good consideration of a promise, though there be no *actual benefit* to the party undertaking; for if the promisee is to sustain a loss or damage, lose a right or have it delayed, it is as good a ground of a promise as an advantage to the promiser; for whenever the promisee sustains any disadvantage at the promiser's request, it is but reasonable, his promise made for the promisee's benefit should hold or be binding; and it seems to be a general principle, if one for a valuable consideration undertakes to do what is even *impossible*, and fails to perform, an action lies against him. But where one partner undertakes to get insurance on their vessel for himself and partner, and neglects, it is no consideration, &c. Ch. 73 a. 2, s. 8, the case.

Salk 26, ART. 12. *Want of consideration does not apply,* when the undertaker enters on doing the thing. As when one entered Coggs v. Bernard.—1 Bac. upon the business of moving a hogshead of brandy, and *did it so negligently*, that it was burst and lost; it was held the action lay against him, and was grounded on the *misfeasance*, or deceit to the plt. But if there be no consideration, and the party do not enter upon the business he is not liable; not on contract, for there is *no consideration* to support it; and not for doing the business badly, not commenced.

1 Wils. 88, § 2. It follows that if A, *without any consideration*, promises Martindale v. to build me a house by such a day, and he does not enter up- Fisher.—1 Ld. Raym. 124.—10 Johns. R. 90, 91.

on the business, I can have no action against him. But he may be liable for *negligence*, if he do enter upon it, and do it negligently or *unskilfully*, for whenever one begins a piece of business for another, the law implies an obligation to do it faithfully and well. Promise for promise is a good consideration without the pl't's. performance; or *mutual* promises.—Hob. 88.

CH. 1.  
Art. 14.

ART. 13. A *prior moral duty* is a sufficient ground of an *actual* promise, as a promise to pay a just debt that is *out-laned*; but the law will not raise an *implied* promise upon it.—See 3 Bos. & P. 249, 252, many cases in a note on this point.

Imp. M. P. 161.—2 Bl. Com. 445.—2 East 506, Atkins v. Banwell. 3 Mass. R. 438, Salem v. Andover.—2 Ld. Raym. 757.

§ 2. Therefore, where one parish supported the pauper of another, without any agreement, it was held the latter was not liable on any *implied* promise; but would be liable on an *actual* promise; the parish being under a *moral* obligation to support its poor; its promise, *in fact*, binds, but the law will not raise an *implied* promise in such a case. See 10 Johns. R. 249, 250, medicine to slave without the master's request.

§ 3. *In case of a feme covert*; as she having a separate estate settled to her use, gave a bond to repay monies by her executors, advanced at her request, on security of the bond, to her son-in-law; and after her husband's death she wrote, promising her executors should settle the bond; held that *assumpsit* lay against her executors on her promise. 5 Taun. R. 36, 48, Lee v. Muggeridge. And held because she was bound *morally and conscientiously*, to pay the debt, was her express *assumpsit* good, made on that ground alone. It is best, as was done in this case, to state facts shewing the moral obligation, &c.

ART. 14. A *deliberate contract in writing*, is *prima facie*, though not conclusive evidence of a consideration. A *written* promise is, of itself, evidence of deliberation generally, and generally, a *deliberate* promise is evidence of a consideration or of *reasonable motives* inducing the promise; but not *conclusive*, for a man may in some cases promise without a cause, and then he is admitted to prove that there is no consideration, even in the case of a bill of exchange. Hence in *Petrie v. Hanny*, Lord Kenyon said, "If it appears to the court that a bill of exchange is given *without consideration*," it is void, "*ex quo non oritur actio*, or if for an illegal consideration, the whole matter may be examined," but the consideration in a *voluntary* bond cannot be gone into.

Salk 129, Clerk v. Martin.—Imp. M. P. 392.—3 T. R. 421, Petrie v. Hanny. See art. 46 post.

§ 2. The Sup. Jud. Court of Massachusetts, June Term 1785, carried the principle so far as to hold, that in an action even by the *endorsee* of a note against the maker, want of consideration might be given in evidence; for want of consideration, said the court, made the note void *ab initio*, and endor-

Pierce v. Mc Intire, Essex, and so in Lewis v. Frund, Essex, 1790.—See Chipson v. O'Brien.

CH. 1. sing it over could not make it good ; and that the endorsee  
 Art. 15. might look to the endorser. But the authority of the last case  
 may be now questioned, and it will appear on examining the  
 modern cases, that this want of consideration cannot be shewn  
 in such an action, unless the endorsee takes the note *after* it is  
 dishonored, or when he has reason to suspect it. Nor can the  
 maker impeach his note after endorsed, for by endorsing it he  
 gives it currency.

Imp. M. P.  
 Kyd on Bills  
 13, 166, 168.  
 —Bull. N. P.  
 274.

ART. 15. *As to impeaching a promissory note on account of a consideration.* § 1. By the statute of the 3d and 4th of Anne, adopted in Massachusetts and most of the United States, a money note payable to one or order, or bearer, in writing, is negotiable. "The want of consideration it is evident, will be a sufficient defence to an action by one party against another, from whom he has immediately received the instrument ; for according to the general principles of law, no contract can be supported without a consideration ; and accordingly it frequently occurs that the debt. rests his case on the circumstance of the bill or note having been merely for accommodation." "But where the plaintiff has, in fact, given a consideration to the person from whom he immediately received the instrument, any preceding party being sued on it, cannot protect himself by saying that he himself had no value of the party to whom he gave it ; for by making himself a party to the instrument, he contributed to its currency." "And in this respect there is no difference, whether the person who actually gave a good consideration, knew that the instrument was given without one or not." And generally the illegality of the consideration cannot be shewn to impeach a note, or bill, in the hands of a subsequent holder.

Pow. on Con.  
 340.—Every  
 note within  
 the statute  
 imports a  
 considera-  
 tion, unless  
 the contrary  
 appears in  
 the note it-  
 self. Johns.  
 R. 217.—  
 Dougl. 633,  
 Peacock v.  
 Rhodes.—See  
 2 Phil. Evid.  
 15, 16.

§ 2. But, as will be stated in another chapter, one, who puts his name to a negotiable security, may impeach it in regard to any matter arising *after* he so sanctions its currency.

7 Mass. R. 14.  
 —Imp. M. P.  
 408, 409.—  
 7 D. & E.  
 117.—1 Bl.  
 R. 445, Guichard v. Roberts.—Stra.  
 674, Jeffries v. Austin.  
 All these cases are cited  
 1 Esp. 33.

§ 3. As between the drawer and payee of the note, the defendant may go into the *consideration*, and shew it is *illegal*, as given on a *smuggling consideration*, or delivered as an *es-crow* ; but the *endorser* was not allowed to prove he indorsed the note to the plaintiff, an endorsee, to enable him to sue the maker only. Bull. ch. 274, *Snelling v. Briggs*, but in *Guichard v. Roberts*, the court allowed a note *absolute* on the face of it, to be proved to be a *conditional* one ; (but *quere*) so to shew no consideration as between maker and promisee. 2 D. & E. 71 ; 3 do. 421 ; 7 Johns. R. 383 ; 13 do. 52, 54 ; 15 do. 230.

§ 4. By certain statutes a note is void even in the hands of an *innocent endorsee* ; as by the 9th of Anne against *gaming* ; and  
 Imp. M. P.  
 406, 407.—  
 2 Stra. 1155.  
 Bowyer v. Bampton.—Dougl. 247, 636, 735, 744, *Lowe v. Waller*.—Kyd on Bills 154, 155.



Mass. act of Mar. 4, 1786 against it ; so by the English statute and Mass. act of March 16, 1784, against *usury* ; and though the note be given for a valuable consideration, and the endorsee have notice of the gaming or usury ; for the statutes declare the contracts void and of no effect.

CH. 1.  
Art. 16,

§ 5. A *smuggling consideration* avoids the note between the original parties. 1 W. Bl. 446.

§ 6. The rule that " an *assignee* must take the thing assigned, subject to all the equity to which the original party was subject," does not apply to *negotiable* paper ; for if this rule should be " applied to bills and promissory notes, it would stop their currency." They cannot be impeached in a suit by or against a *third* person, as an endorser or acceptor. Doug. 632, 636.—Salk. 344, Jacob v. Hussey.—Bul. N. P. 274.

§ 7. The established rule now seems to be, that where the note is *over-due*, and so there is room to suspect it when endorsed, it may be impeached in the hands of the *endorsee* ; and the principle may apply in any other case, where he has reasonable cause of suspicion ; as if the note or bill is, on the face of it, dishonored.

Kyd on Bills 160.—3 T. R. 80, Brown v. Davies, Banks v. Colwell.—7 T. R. 423, Borken v. Sterling.

§ 8. The payee of a note, *after it became due*, and noted for *non-payment*, endorsed it ; in an action on it by the endorsee the court allowed the *maker* to prove he paid it to the payee *before* it was endorsed ; because not being paid when due, a suspicion naturally arose against it. The note of Banks was payable *on demand*, and was endorsed 18 months after it was made.

§ 9. But the above rule does not apply to bankers in England, who issue their checks ; as where one issued one 9 months *after it bore date*. Held he could not object, though the consideration failed, as between him and the deliverer, in a suit by an *after* holder for a valuable consideration, and without notice. The discharge of one from prison, legally committed, is a good consideration of his note, and it is valid.

2 Bos. & P. 151.

ART. 16. *There are two kinds of considerations*, which are good, such as *blood* and *natural love and affection*. 2d, *Valuable*, as *money*, *marriage*, &c. Deeds and contracts made only on *good* considerations, are often deemed merely *voluntary* ; and are set aside in favor of *creditors* and *bonâ fide* purchasers.

2 Bl. Com. 297.

§ 2. All agree that *want of consideration* does not affect a contract under *seal* at law, but equity will inquire into it and not aid it, if the consideration be not valuable or meritorious.

Pow. on Con. 332.—New. on Con. 66.

§ 3. And a contract for a *good* consideration only, is valid as against heirs, executors, or administrators.

§ 4. The plt. paid a sum of money to the master of a work house to the use of the poor in it, to avoid a prosecution for an offence charged against him, and paid by the consent of

9 East 49, Taylor v. Lindsey.

CH. 1. the magistrate. Held he might recover it back any time before  
 Art. 17. applied, there being no consideration to establish a contract—  
 master was the plt's agent.

New. on  
 Con. 66, 60.—  
 Cases in equity,  
 257.—  
 7 Ves. 30, 34,  
 White v. Da-  
 mon.—10  
 Ves. 470.

§ 5. *Considerations in equity.* This must be such as will induce the court to decree a specific performance of an agreement; a parent's agreement with a child in consideration of love and affection is good. But if the price in any case appear to be inadequate, equity will not, but in special cases, enforce the agreement; as where the estate is sold for half its value, though at auction; but Lord Eldon thought otherwise—who held a sale at *public auction*, and no fraud, could not be set aside for mere *inadequacy* of price, yet may not be enforced.

3 Atk 185,  
 Goring v.  
 Nash.—Fr.  
 Ch. 475, Far-  
 saher v. Rob-  
 inson.

§ 6. For *inadequacy* of price, equity will not rescind a contract, though it will enforce it or not, according to circumstances; and in some cases it decrees specific performance of a contract not founded on a valuable consideration, but only on a parent's natural love and affection for a child. A provision for an illegitimate child is no consideration; he is *filius nullius* in equity as well as in law. See ch. 32 a 4, 11; New. on Con. 357 to 361.

1 Ver. 427.—  
 1 Ch. Ca. 243,  
 Billingham v  
 Lowther.

§ 7. On the same principle, equity views a provision for a child a good consideration, it does a provision for a wife, even though made after marriage, and by a voluntary bond to settle a jointure on her, and settling lands accordingly; but *secus* as to a *collateral relation*, but in very special cases. A remainder to a brother in tail, even in marriage articles, is not a consideration in equity; but still there may be some other consideration in the articles or contract to entitle him; and see ch. 225, a 2, s. 7; Trevor v. Trevor, 1 P. W. 631; Randall v. Willis, 5 Vesey, jun. 273, 276.

1 P. W. 727.  
 —1 Atk. 1.—  
 Ch. 1 a. 29, s.  
 3.—3 Ves. 412.  
 —2 P. W.  
 181.

§ 8. So a compromise of a doubtful right is a sufficient consideration in equity of an agreement; and so one made to save the honor of a father and his family; so to settle boundaries; 1 Vesey 144 and 450, Penn v Lord Baltimore; so the peace of families is a consideration; so an agreement to make mutual wills; to share what a person shall give by will; but in an agreement merely voluntary there is no consideration to rest upon.

Hob. 106.—  
 3 Salk, 96.—  
 2 Stra. 728,  
 Osborne v.  
 Governor.—  
 1 Esp. 87.—  
 1 Bac. Abr.  
 173.—4  
 Dallas 111,  
 130.

ART. 17. *A mere voluntary courtesy is not a consideration to support a promise, unless moved by the defendant's request, and unless the act done pursue the request; for that is a kind of commission for the purpose.* Hob. 106, Lampliegh v. Brathwaite, ch. 1. a. 37.

§ 2. And what has been undertaken without a prospect of a certain recompence is such a *courtesy*; as where one works for A, with a view to a *legacy*, and is disappointed, he cannot have

recourse to wages; there is no intent or assent in, or agreement by the parties, expressed or implied, whereon to ground an action. But 3 Johns. R. 199, *Jacobson v. Le Grange*, seems contrary, and the plt. recovered wages by verdict.

CM. 1.  
Art. 22.

ART. 18. *Considerations executory, &c.* § 1. A consideration is so, when the plaintiff promises to *deliver* a thing, and the defendant promises to pay, and is *traversable*, and must be laid with a venue.

Salk 22, Sexton v. Miles.  
—Newland on Con. 82, 87.

§ 2. If A agree to accept a certain sum of B, in discharge of all accounts between A and C, B's brother abroad, and give a release to C's use, as he should be required; and B promises A to procure for him a general acquittance from C, when he shall return, this is a good consideration; for B's paying the sum and A's accepting it, is sufficient, though the main acts of A and B are *executory* in regard to the release.

Cro. Car. 19, Farrer v. English.

§ 3. So if A owe B £10 on a bond, and B promises that in consideration A will pay at the day, to give up the bond, this promise is valid.

Cro. Car. 8, Flight v. Croden.

§ 4. An executor of *his own wrong*, is not so bound to pay the debts of the deceased, as to make it any consideration for his promise to pay them; as where A owed B £10, A died and his wife become his executrix *de son tort*, B assigned his debt to C, and empowered him to receive it to his own use; C declared that in consideration he accepted her as his debtor, she promised to pay the debt; adjudged ill, for C having no right in the debt, and the wife owing him nothing, there was no consideration; and though C had an equitable interest in the debt, yet the wife was under no obligation to pay; but if she had been under even a *moral* obligation only to pay C, then her promise to pay him, being *actual*, would have bound her.

1 Saunders 210, Forth v. Stanton.

§ 5. *Where the note given by bail may want consideration.* *Non est inventus* returned on a case against the principal; the bail gave a note for the amount of the judgment, afterwards reversed, and before the bail was fixed. Held the note wanted consideration, and was void, for the bail never became liable, and when the judgment was reversed, it was as if it never existed. Cases cited, 2 Johns. R. 101; 1 Wils. 16; 3 D. & E. 390; 2 Sellon 128; 2 Stra. 867; Cro. J. 645; Jenkins' R. 319, pl. 21; 2 Roll's R. 254. 3 Johns. R. 463, giving up a bond the consideration of a note.

3 Johns. R. 463, 767, Tappan v. Van Wageningen.

ART. 22. *Both parties must be bound, &c.* § 1. The general rule is, that both parties must be bound, that the consideration which induces each to contract may be good; but there are exceptions to this rule. Cases, &c.

3 T. R. 653, Cook v. Orley.—1 Com. D. 194, 523.—10 Mod. 25.—3 Wood's

Con. 526.—Sid. 440.—2 Stran. 978, 850, 937.—Holt v. Ward, 2 T. R. 763; Bennett, 1 Salk 112.—6 East 614.—1 Bl. Com. 113, Christian's notes.

Corbett v.

CH. 1.      § 2. A proposed to sell a bale of goods for £40, and gave  
 Art. 23. B, the proposed buyer, six hours to consider of it; B in the  
 mean time accepted the offer; yet it was decided in *Cook v. Oxley*, that A was not bound; that there was no consideration, because B was not bound to take the goods. And 1 P. W. 304, *Eyre v. Eyre*.

§ 3. The distinction seems to be between contracts *void* and *voidable*; hence both parties are bound, where the contract is *only voidable* as to one of them; as if an infant be one contracting party, the other party of age is bound, for the minor's contract is not *void* but *voidable only*, and so may be a consideration of the other's contract to hold *him*; therefore it was adjudged that where "an infant and another of full age covenant one against the other, the covenant of the person of age should bind him. The minor may confirm his contract when he comes of age, and he cannot annul it before; and an after promise may revive or confirm that which is *voidable only*, and the minor may do this when of age; but if *void* in its creation, no after promise can confirm or revive it; for a contract *ab initio* void cannot be confirmed. Upon this distinction it follows, if I promise to pay a married woman \$100, in *consideration of her promise* to deliver me a bale of goods, my promise is void, because her's being void *ab initio*, is no consideration for mine, and her void promise cannot be renewed, or be the consideration of another.

Saund. 137  
to 137 d.

3 T. R. 22,  
Nerot r. Wallace.

ART. 23. *A man's promise is a consideration, only when he is able to perform.* § 1. Every one who promises a benefit must have the power of conferring that benefit to the extent professed; or his promise fails, and is not the consideration intended for the promise of the other party.

1 Esp. 3  
Briggs' case.

§ 2. As if I promise to make a lease of black acre to B, and in consideration of *my promise* to do this, he promises to enter and pay rent, and it turns out that I had no power to lease black acre, he is not bound to enter and pay the rent; because my ability to lease, understood when the contract was made, is, in such case, the cause or motive inducing his promise, and when this cause fails his promise rightly fails.

Farr. Rep. 13.  
Take's case.

ART. 24. *A loss or prejudice to one is a good consideration.* § 1. It is a sufficient consideration to make the contract of the promiser valid, if there be a *trouble, loss, or prejudice to the promisee*. The reason is plain, it is this, on the part of the promisee, and as to which to indemnify him the promise is made, though of no advantage to the promiser; as if it be no advantage to me to occupy A's store, but it is an inconvenience or prejudice to him, to let me do it, and for the occupation I promise to pay him a certain sum, I am bound to pay accordingly.

§ 2. So where A had a note against B, and C told A to deliver it to him, and he would pay A the amount, this promise of C binds him. This delivery to C was a disadvantage to A, a new consideration, and the motive and ground of a new and distinct promise made by C. CH. 1.  
Art. 25.

ART. 25. *Considerations illegal in whole or in part, are bad.* § 1. It has been a question, if I engage to pay the debt of another, whether or not the *consideration* of my promise must appear in the writing. In Wain's case it was held that the *consideration* of the promise, as well as the promise, must be stated in the writing. So much being implied in the word *agreement* to pay, used in the statute of frauds. But in Egerton's case, it was decided, that where A and B agreed to give him 19d. per lb. for 30 bales *Smyrna cotton*, &c. they were bound, though no consideration was expressed. And the court justified the distinction between the two cases, on the different wording of the two clauses, as to the debt of another and goods, in that statute. But in Hunt's case our court said these two decisions were not easily reconciled, and decided that when Jos. Chaplin, July 23, 1804, for value received, promised to pay Isaac Bennet \$1,500, Dec. 1, 1804, with interest, and the debt. underwrote, "I acknowledge myself holden as surety for the payment of the demand of the above note," and signed, the debt. was liable. The court doubted as to Wain's case, but further held in Hunt's case, that the debt. was an *original* undertaker, as well as Chaplin; and that their contracts were *joint and several*, Chaplin as *principal*, and the debt. as *surety*, and viewed both as signing at the *same* time, and that here the *consideration* that bound the *surety*, was the *credit given to the principal*. 5 East 10.  
Wain's case.  
—6 East 307,  
Egerton v.  
Matthews.—  
5 Mass. R.  
366, Hunt,  
admr. v. Adams.

§ 2. The plt. gave 20s. to the debt., in consideration of which he undertook to beat J. S. out of such a close, or pay 40s. and he did not do it; held, the plt. could not recover the 40s., the consideration being an *illegal* act. So, if *two box for a wager*, the winner cannot recover, because boxing is illegal; otherwise, of playing at *cudgels* or any legal amusement. Lev. 174, Allen v. Reacons.  
Bul. N. P. 16.  
—Lofft 766.

§ 3. *In part bad.* As where the plt., a *bailiff*, had arrested one for debt, and in consideration *the plt. would let him go at large, and of 2s.* paid to the debt., he engaged to pay the whole debt; this engagement was adjudged void; for the promise being to the same effect as an obligation, which would be void by statute 23 H. 6, the promise shall be so too, and though coupled with another consideration as the *2s.*, yet being void as to part, it is void as to the whole. Cro. El. 199,  
200, Fetherston v. Hutchinson.

§ 4. So if the promise grow out of an *illegal* transaction, it is void; as where one illegally proposes to sell an office, and promises two per cent. to one, who will get him a good price. 2 Wils. 133,  
Stackpole v. Earle.

## CH. 1.

## Art. 27.

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 Cowper 341,
 Holman v.
 Johnson.—
 1 Cro. 190,
 Milward v.
 Clerk.—2
 Caine's 149.
 —2 Wils. 339,
 352, Turner
 v. Vaughan.
 —Watson on
 partnership
 108.—6 Johns.
 R. 327.—1
 Com. D. 186.
 —Hob. 216,
 Bidwell v.
 Alton.—
 Pow. on Con.
 346, 353.—1
 Esp. 94.—
 Cro. El. 19,
 Lutwich v.
 Hussey.—
 Jones' case,
 9 Co. 91.—
 Bane's case,
 Cro. El. 387,
 768.—Cro.
 Jam. 47, 397,
 683.—3 Salk.
 96.—2 H. Bl.
 312, Pullin
 v. Stokes.—2
 Saund. 187 to
 337 d.—4
 Johns. R.
 237, 240.

Pow. on Con.
 353, 354.

See art. 45.
 9 Co. 93.

Dyer 272.—1
 Com. D. 186,
 187.—Cro.
 El. 700, 126,
 Morning v.
 Knapp.

3 Salk. 96.—
 Rol. 30.—1
 Vent. 154.—
 2 Wils. 341.

§ 5. But where the *transaction itself is lawful*, as selling tea at Dunkirk, *no after illegal use of the subject of it*, as the smuggling that tea into England by the buyer, and that known to the seller at the time, will destroy the *assumpsit*, where the promise is made to the party. So if I merely sell goods, I know will be illegally used, I may recover. 5 Taunt. R. 181. See Lotteries.

§ 6. And if a *bond* be given conditioned to pay money in common form, it may be shewn it was for an *illegal consideration*, as to stifle evidence. See art. 35. If A, B, and C owe a void *stock-jobbing debt*, and A pays it of his *own head*, he cannot make them contribute; otherwise, if he pay it by their consent. Where the law of the state forbids lotteries, contracts to buy tickets in them are void.

ART. 26. *Forbearance*, when a consideration. § 1. To forbear or stay a suit in law or equity for a just debt, is a good consideration, though the action be not discharged; for this is a benefit to the debt. and a prejudice to the plt. The request to stay implies a just debt; but the *forbearance* must be for some *reasonable time*, for mere unspecified forbearance is void; as one may be only for an hour, and so merely frivolous; and, also, the forbearance must be stated, that the court may see what sort of forbearance it is; for it is a mixture of law and fact—must be to some person named. 4 East 455.

§ 2. If an *executor*, in consideration of *forbearance*, promise to pay the testator's debt, this promise is valid, and the law presumes he has *assets*, and his promise makes it his own debt; but Coke said, that if it appeared he had *no assets*, the promise was void; and the time allowed the executor must be a reasonable time. A recovered judgment against B, and committed his execution to the sheriff, and A, at the request of C, caused the sheriff to stay the levy, and C thereupon promised to pay A the debt, costs, poundage, and other charges, judgment against C, though it was not expressly averred the sheriff did desist from the execution, though this was implied. See art. 26 and 28.

§ 3. And in Band's case it was held, that if a *stranger* say to the creditor, forbear your debt to such a day and I will then pay it, he is held, though no benefit to him.

ART. 27. *A debt due only in conscience is a good consideration of a promise.* § 1. As if a minor contract a debt, and when come of age, promises to pay it, in consideration of forbearance, his promise is good; and so if there be no forbearance. 1 Esp. 173.

§ 2. So if the *assignee of a bond* with power to sue or release it, promise to forbear, it is a good consideration of the debtor's promise to pay him. So as to a debt barred by the statute of limitations.

§ 3. So if A be bound for a minor and pay the debt, and he at full age, promises repayment, it is good ; and if the deft. plead *infancy*, and the plt. reply, that after the deft. come of age he confirmed the several promises alleged, the plt. need only prove the deft's. promise, and he must prove his own *infancy*. Judgment for the plt. 2 H. Bl. 126, ch. 99, a. 3, cited 1 Phil. Evid. 161.

§ 4. So a promise to pay a debt discharged by the insolvent act is good ; for it remains due in equity and conscience, and *Scouton v. Eislord* ; but to pay when able is *conditional*, and to support the action the plt. must prove the deft. able, &c. 7 Johns. R. 36.—Cowp. 544.

ART. 28. *When assets are a good consideration for an executor's promise.* § 1. If an executor have *assets*, and promise to pay a *legacy*, an action lies against him in *his own right* ; and the judgment is *de bonis propriis* ; for his having assets to enable him to pay, there is a good consideration, a sufficient reason for his promise, and he is bound.

§ 2. Upon the same principle, if lands be devised to A, he to pay a legacy to B, and A accepts the land, there is an implied promise to pay, and the consideration is good.

ART. 29. *If no cause of action exist there is no consideration.* § 1. As where a married woman gives her note there is no debt whatever, and a promise to pay, in consideration of forbearance, is totally void, though she gave it as a *feme sole* : for the note is not merely *voidable*, but absolutely void ; otherwise if only *voidable*. But if after she shall become sole and she promises to pay the amount of the note, it may be a question, how far it is a debt in conscience and equity, and so how far she may be bound on that account.

§ 2. So where the plt. got a note for his whole debt of the bankrupt, which was a fraud on the other creditors, and so void, an after promise to pay it, was held void. So to stay an unjust suit in chancery is no consideration ; nor is the son liable for his father's debts, and consequently, if he promise to pay them, even in consideration of forbearance, his promise is void.

§ 3. An agreement to settle boundaries, though nothing of value is given, implies a good consideration to both parties, who have an interest in avoiding contention. 2 Vern. 494.—New. on Con. 305.

ART. 30. *Considerations past.* § 1. On a general principle, considerations past and executed, are not the foundations of promises ; because in regard to them there is no motive to action, but very few considerations once good, are strictly past, but continuing.

CH. 1.

Art. 29.

3 Leo. 164.—
1 T. R. 648,
Borthwick v.
Carruthers.—
7 Johns. R.
36, Scouton
v. Eislord.—
Dougl. 442,
Best v. Baker,
notes.

See art. 26.
Cowp. 289,
Hawkes v.
Saunders.—2
Saund. 137.

Strange 94,
Loyd v. Lee.
—Pow. on
Con. 354.

2 T. R. 763,
766, Cock-
shot v. Ben-
net.—1 P. W.
768.—1 Atk.
105.—4 D. &
E. 166.—3
Ves. jr. 456.
—6 Ves. jr.
300.—4 East.
372.—Cro.
El. 206, Too-
ley v. Wind-
ham.—Pow.
on Con. 355.
—1 Ves. 444,
Penn v. Lord
Baltimore,
cited Ves. jr.
385.

CH. 1.

Art. 31.

Cro. El. 42,
Sidnam v.
Worthington.
—Dyer 272.
—Cro. Car.
409.—Cro.
Jann. 18. Bor-
din v. Thinn.
See Ch. 32, a.
4, s. 18.

10 Johns. R.
243, Hicks v.
Burham.

§ 2. The plt. at the *deft's. request*, became surety to A, who recovered against the plt. ; the deft. afterwards promised the plt. to pay, if H did not pay him the monies the plt. had paid. H did not pay, nor did the deft. on request ; held the plt. might recover against the deft. though his promise was not made at the time of the request. In this case there was a good consideration for the deft's. promise ; because when the plt. did an act at the *deft's. request*, the consideration that arose from the plt's. act, continued.

§ 3. So if I request one to serve me a year, and he does so, and after the year is expired, in consideration he has served me, I promise to pay him \$100, an action lies, the consideration is continued. A written promise to pay founded on a past consideration may be good, if the past service be stated to have been done on request.

§ 4. But if one agree to serve me a year for \$100, and after the year I pay him that sum, and in consideration of his service, promise to pay him \$10 more, this is no consideration. In the first there is an honest debt due at the time of the promise, but not in the last case, for he is paid according to agreement or contract.

Cro. El. 59,
94, March v.
Ravenford.—
3 Salk. 96, 98,
Peake v. Un-
ger 63, 64,
Coke v. Bar-
rows.—Cro.
El. 138, War-
cop v. Morse.

§ 5. At the deft's. request there was a communication of marriage between the plt. and the deft's. daughter, and afterwards the plt. married her, and *afterwards* the deft. promised to pay him £100. The court, three judges, resolved the consideration was good, though it was agreed it was *past*, and had no reference to any act before, and it was admitted by the other two judges, that if the marriage had been at the *deft's. request*, and *after* the marriage he had promised, it had been good.

1 Roll. R.
413, Hodge
v. Vavason.—
Pow. on Con.
360.—1 T.
Raym. 200,
Church v.
Church.

§ 6. In consideration the plt. had bought of the deft. certain lands, Dec. 10, *afterwards*, Dec. 19, he promised to make him a sufficient assurance therefor, before such a day. It was objected that the consideration was executed and past ; but judgment was for the plt., for the assurance was the substance of the sale and matter ; and the reason of the promise continued.

Church v.
Church.—
Hodge v.
Vavason.

§ 7. So a prior duty is a consideration ; as if the deft. be indebted to the plt. in £10 such a day, and in consideration thereof, *afterwards*, such a day promises the plt. to pay him, the promise is good ; this is not strictly a *past* consideration, but the continuance of the debt raises the promise ; the duty remains, and by reason of the remaining duty the law raises the promise.

1 Com. D.
193, 194.—
Cro. El. 63.—
Pow. on Con.
363,

ART. 31. *Considerations grounded on relationship, when good or not.* § 1. The plt. had administered physic to the *deft's. son*, and spent monies abroad at his funeral, the deft. pro-

mised to pay. Held this promise was good ; for the *moral* obligation the father was under to reimburse these advances on account of his son, was a sufficient consideration for an *express* promise. But it is a question if a cousin's promise in consideration of marriage is good ; but a promise to a *father* in consideration of such a case, to pay a certain sum to his *daughter*, has been adjudged good, and she recovered. Money lent to the wife is a good consideration for the husband's promise, if at his request.

CH. 1.
Art. 35.

Pow. on Con.
353.—3 Wils.
388.—2 W.
Bl. 872.

ART. 32. *The discharge of a debt is a good consideration.* § 1. To discharge a debt, even due from a *stranger*, is a good consideration for the debt's. promise ; for whether a benefit or not to him, it is a loss to the plt. ; for at the debt's. request the plt. gives up a debt or right, and it is just and reasonable *the debt.* fulfil his promise, given as a consideration for such relinquishment.

Hob. 4 and 6,
Lane v. Marl-
lory.

ART. 33. § 1. *To prove a debt is a good consideration*, for to prove is a charge and trouble to the plt. ; as where an executor or administrator promises to pay a debt, on proof to be adduced of the delivery of the goods to the deceased, or on shewing a bond by which the deceased was bound ; for in all such cases the plt. is put to trouble and inconvenience to do something at the debt's. request implied, and confiding in his promise to perform. There can be no good contract, without a *quid pro quo*. Dyer, 90.

1 Sid. 57, 369.
—Lev. 94.
Cro. El. 67.
—1 Com. D.
189.

ART. 34. § 1. *The bare relation between owner and tenant*, is a consideration for his promise to cultivate the lands in a good and husbandlike manner. In this case the consideration stated was, that "*the debt. became and was tenant to the plt.,*" and in consideration thereof, he promised not to carry away from the farm any of the straw, dung, compost, &c. ; and in a second count, that for the same consideration he promised to cultivate the land in a good and husbandlike manner, according to the custom of the country, and this was, on a motion in arrest of judgment, held to be a good consideration.

5 T. R. 373,
Powley v.
Walker.

§ 2. So the plt. stated that he agreed to suffer and permit the debt. to occupy and enjoy a house and three mills, for such a time, he in consideration thereof promised the plt. to pay him a reasonable rent, &c. This was adjudged to be a good consideration ; the debt's. request to be allowed to occupy and receive the profits was clearly implied.

3 Mod. 78,
Mason v.
Beldham &
Cro. El. 85.

ART. 35. *Cohabitation where a consideration or not.* § 1. In debt on a bond conditioned to pay £30 a year to the plt., in consideration of cohabitation had with her by the debt., there was oyer and demurrer, and two objections made ; 1, that the bond was given for an *illegal consideration* ; 2, that the consideration was *past* ; but judgment was given for the plt. So

2 Wils. 339—
341, Turner
v. Vaughan.
—2 Ves. 160.
—3 P. W. 339.
—3 Ves. Jr.
366.—3 Maule
& S. 463.

CH. 1. good if after cohabitation to pay her, if they part and she live single and not cohabit.

Art. 38.

1 W. Bl.
517, Walker
v. Perkins.—
1 Esp. 193,
the same
cases in 2 P.
W. 432.—3
Br. P. C. 445.
—Ambl. 520.

Ambl. 641,
Hill v. Spen-
cer.

Hob. 10,
Griesley v.
Lowther.

Rol. 20, 21.

Hob. 105,
Lamplugh v.
Brathwaite.—
1 Esp. 87,
many cases.
—3 Bos. & P.
249, in a note.
Ch. 1, a. 13.

2 Lev. 224.

Rol. 20.—

Cro. Car. 8,

Flight v. Crasden.—Cro. El. 194, 429.—1 Vent. 258.

§ 2. Debt on a bond given to a woman seduced, for cohabitation with her by the obligor, and for maintenance after his death. On *oyer* these terms appeared to be in the bond, and it respected also *future* cohabitation. Judgment for the deft., for the consideration is *illegal*. It may be observed on these two cases, that in the first, the bond was for a *past* wrong, and so to make reparation, in the second in part for a past injury, seduction, and in part to induce the woman *to continue to live in fornication*, as the bond was, that she *should* live with him, &c., and so is the distinction in equity. The moral, as well as the legal principle is very different in the two cases; the bond for the past is valid, if given even to a common prostitute, if no fraud.

ART. 36. *The wife's consent good or not.* § 1. The deft. applied to the mother, a married woman, for her consent for him to marry her daughter, and in consideration she would consent, he promised to pay her £100. This was adjudged to be a good consideration, though the daughter was wholly in the husband's power, and the mother had none over her; for the mother has a natural influence, the employment of which to promote the marriage the deft. sought, was a reasonable cause for the deft's. promising to pay her the £100.

§ 2. So in consideration a *feme covert* permitted her son to be a servant to the deft., he promised, &c., it was held the promise was good and binding. So in consideration a *married woman* would not hinder her husband to sell and convey lands to the deft., he would pay, &c., held binding; for though in such cases the wife, strictly, has no *legal power*, yet she has an *actual influence*, to have the advantage of which may well be a sufficient reason to induce the deft. to make a promise.

ART. 37. *The plt's. endeavours, &c. when a consideration.*

§ 1. The deft. having killed a man, *requested the plt.* to aid him; and the declaration stated, that in consideration the plt., *at the deft's request*, would labour to procure a pardon for him, promised to pay him £100. The plt. alleged that he did labour by all the means he could, and for many days do his *endeavours* to obtain the pardon, &c. Judgment for the plt.; the *request of the deft.* to the plt. was to *endeavour*, and he performed, &c.

§ 2. Marriage is always a continuing consideration, (see art. 41,) and it is a valuable consideration, and when had at the promiser's request there is in it every essential of a good consideration.

ART. 38. *To do voluntarily what one ought to do is a*

good consideration. And though compellable to do it, as where the plt. and deft. were sureties, and the deft. said to the plt., pay the debt and I will pay you a moiety, it was held the deft. was liable. So when the plt. owed the deft. a debt on bond, the deft., in consideration the plt. would pay it, promised to cancel the bond; it was decided the deft. was liable to an action, though the plt. only paid the debt when due, for non payment at the time might have been a trouble and a loss to the deft.: though in such a case the plt. only does an act, he is liable by law to do, yet as he does it at the *special request of the deft.*, the court may well presume he has sufficient reasons for making the request to have punctual payment, instead of being driven to adopt compulsive process, and to experience trouble and delay, and, therefore, to make such promise in order to effect such payment.

CH. 1.
Art. 41.

3 Salk. 96.

ART. 39. § 1. *A consideration perfectly past or executed is bad*, for in such a case there is no cause or motive remaining to induce the promise. As where two *had* bailed the deft's. servant, in consideration thereof he promised them to save them harmless; held this promise was void; but otherwise, had they bailed him at the *deft's request*. In the first case the promise was merely a naked one; but in the last, it would be coupled with the *preceding request*; and when done at this request, a moral obligation or duty arose to indemnify, which continued to be such, and when on this an *express* promise is made, it is binding on principles before stated.

ART. 40. § 1. *Idle considerations are as none*, it affords no reason or motive for promising. As if an *arrest be void and illegal*, and in consideration of discharging the arrested man, the deft. promises to pay the debt, this consideration and promise are void.

Godb. 358,
Randall v.
Harvey.—
Hard. 73.—
Pow. on Con.
556, Good-
win v. Will
loughby.

§ 2. So where *corn is not distrainable*, and the lessee in consideration the lessor would not distrain it, promised he would pay his rent that was due: adjudged to be no consideration.

§ 3. So it is no consideration for the creditor to accept a *third* person for a debt, unless he discharge the original debtor; as where A owed the plt. a debt, and the deft. promised to pay it if the plt. would accept him as paymaster, and wait six months. This was adjudged no consideration; for the plt. might still sue A, and so was at no prejudice.

Goodwin v.
Willoughby.

§ 4. It was held that an estate at will is no consideration, nor can I *do one a kindness without his consent* and claim a recompense, nor can I lay one under an obligation by bettering his case, if not done at his request.

1 Bac. Abr.
170, 171.

ART. 41. §1. *A consideration continuing is good without request*, or wherever it remains *executory*; as where the deft.

3 Salk. 96.—
Stiles 305.—
Hard. 73.—1
Bac. Abr. 170.

CH. 1. says to the plt., as you married my daughter I promise to give
 Art. 42. you £100. This promise is valid : for the consideration arising from the marriage continues a ground of promise. But must not the promiser's consent to the marriage be expressed, or implied ?

Leo. 102,
 Pearl v. Ed-
 wards.—Cro.
 El. 94.—1
 Bac. Abr.
 174.

§ 2. So if I owe A £20, I borrowed of him, and promise to pay him on a certain day ; this is a good promise, for the *debt* or *duty* continuing, the *consideration must continue*.

§ 3. So where A leases land to B for years, rendering rent, and after a part of the years are expired, and the rent paid, A in consideration B had occupied and paid, promises to save him harmless against all persons for his occupation past and to come. If B's cattle be distrained *damage feasant*, he may have an action against A on this promise ; for *B's occupation continues*, which is the consideration ; B also is to pay and occupy in future.

2 Kettle 99.
 —1 Bac. Abr.
 174, Atkins v.
 Barwell.

§ 4. So in consideration *I have paid a debt for A* and taken a release for him, he promises to repay me, this is a good promise ; for the *benefit continues to him*, and this is a *continuing consideration*. On the same principle is the case of *Atkins v. Barwell* before cited ; for when I have paid his debt for him, he is under a *moral obligation*, and is bound in *conscience* and *equity* to repay me, and this is a good ground for an *actual* promise.

12 Mass. R.
 190—192,
 Homes, adm.
 v. Dana.

§ 5. Several persons agreed to lend to the editors of a newspaper, the Patriot, the sums set against their names respectively, to be paid to one of them as agent. He advanced monies to the editors on the ground of the subscription. Held he had a right of action against a subscriber, who refused to pay the sum he subscribed.

Salk 28,
 Love's case.

ART. 42. *Acts of officers considerations or not.* § 1. It is a well settled rule, that whenever an officer is bound by law to do his duty, his doing it can be no ground of a promise ; but if he do a *legal* act he is not bound to do, it may be the consideration of a promise ; and it may be very proper for me to reward the doing of a legal act, I cannot have done but by contract or agreement.

§ 2. As where an officer seizes in execution the goods of a *stranger*, and I promise the officer that in consideration he will restore them, I will pay the debt ; this is a valid promise, for by the *scire facias* he may sell the goods, and this, in effect, is doing no more ; nor is the officer in such a case bound to restore the goods, hence his restoring them is a proper subject for a contract.

§ 3. But any promise which induces an officer to act contrary to his duty is void, or which has that tendency.

§ 4. It has been adjudged, that a promise to save the under sheriff harmless, if he make such a one his special bailiff, is valid ; this is a lawful act, and he is not bound by law to appoint this particular person. 1 Roll. 16 ; 3 Leo. 227.

CH. 1.
Art. 44.

§ 5. It cannot appear to be fully settled, that a promise to indemnify an under sheriff, if he make execution on such goods, is lawful or not. In several books it is said he ought to take notice of the goods of the party at his peril ; but in other books it is said such promise is reasonable. This last opinion is to be preferred, and the most consistent with modern practice.

1 Com. D.
202.—1 Rolle
26.—Cro.
Jam. 663,
Arundel v.
Gardner.

§ 6. And it has been held in the Sup. J. Court of Massachusetts, that if the goods be not in the deft's. possession, or if the owner's right be disputed, the officer may require indemnity of the plt. before seizure.

See Post.

§ 7. The court may refuse to allow a deft. to go into a consideration, because he has another remedy ; as where A bought land of B, and took a general warranty, and gave his note for the purchase money, and when sued upon it, offered to prove B (the plt. Little) had no title to the land, and so there was no consideration for the note ; but the court refused to let the promisor go into this evidence ; because he had a general warranty, which was his proper remedy, if his title failed ; and it might be further objected that it was improper to try the title in this action on the note, and the general issue pleaded, because afterwards it would never appear upon the record the title had been tried. Same if the land be under mortgage. 15 Mass. R. 171.

Mass. S. J.
Court, Port-
land, July
1797, Little
v. Roberts—
so the note is
valid, if the
promisor
know the de-
fect of title,
or it is but
partial.—2
Wheaton's
R. 13, 18.—
Atkyns 10.

ART. 43. *A compromise of a doubtful right is a good ground of a promise.* This is a clear case, and every day's practice ; and this consideration involves moral obligation as well as interest.

2 Com. D.
334.

ART. 44. *If there be no reward, no neglect, and no skill implied,* there is no consideration.

The deft., a general merchant, undertook, *without reward*, to enter the plt's. goods with the deft's. own of the same sort, at the custom house for exportation ; but made an entry under a wrong denomination ; by which means both parcels were seized. Judgment for the deft. ; for he having taking the *same care of the plt's. goods as of his own*, and *not having received any reward*, and not being of a profession or employment, *which necessarily implied skill in what he undertook*, he was not liable to an action for the plt's. loss. Had the deft. made the entry of the plt's. goods without any request from him, expressed or implied, so to do, the case might have been different. It seems on a view of this whole case, the deft. was requested to enter the plt's. goods, and that it was under *good* the deft. was to have no reward.

1 H. Bl. 186,
Shiells v.
Blackburne.
See ch. 17.

CH 1. ART. 45. *A personal contract once discharged, never can again be the consideration of a promise.*

Mass. S. J. Court, Essex Nov. 1800, *Somes v. Pierce*.—See *Boylston v. Green*, ch. 20 a. 3.

§ 1. In this case one Gilman gave his negotiable note to Pierce for about \$800, and he endorsed it to the Gloucester Bank; Gilman died, and, as was supposed, insolvent, and his widow administered on his estate. She made *her* note to Pierce for the same sum, who endorsed it, and it was sent to the bank, and 60 days' interest allowed on it; and the old or first note was given up to Mrs. Gilman, the administratrix. As her husband's estate was *insolvent*, it was apprehended she might suffer by giving the new note; and after a few days, by consent of the bank, her note was taken back by her and cancelled, and her husband's said note was returned to the bank, and this was noted in the books, and shown to Pierce, and he made no objection. This action was on the old note. And the court held that Pierce was not liable; for when Mr. Gilman's old note was once given up by the bank, and the note of another accepted in payment of it, it was discharged; and the return of it to the bank would not give new force. And it was not clear that an action lay on Pierce's *new* assent to the return of the note; because such assent, if any, was not in *writing*, and *it was the debt of another*; and a *contract once discharged* could not be a consideration of a *new* promise, and a contract once discharged is always discharged.

2 T. R. 24. *Heathcote v. Crookshanks* 2 Johns. R. 208, 213.

§ 2. A being insolvent, he and his creditors come to an agreement for him to pay, and them to receive 5s. 6d. in the pound, to be paid in a reasonable time; no fund was provided to pay this 5s. 6d. in the pound. Held, this agreement is no bar to an action brought by a creditor to recover his whole demand; for the old contract is not discharged, and there was no consideration for the new one. This new agreement is, like accord without satisfaction, no bar; and *accord without satisfaction* is no bar, because a party cannot exchange one cause of action for another of the same nature.

2 Saund. 137 to 137 d. *Barber v. Fox*.—17 Johns. R. 301.

§ 3. And a promise to renew a void contract is void for want of consideration; and in this case it is said, that on *forbearance* to executors, their bare promise in *writing* does not bind them, for want of consideration; and that this is as necessary since the statute of frauds as before; but they are bound, if the forbearance be *at their request*, or if they have *assets*. See Art. 26.

12 Mass. R. 212, *Tudor v. Whiting*.

§ 4. A owing B, to pay him consigned goods to C; on their arrival B took C's promissory note payable in 30 days. In the mean time C failed, having sold the goods. B joined with other creditors in a composition of their demands. Held, he had no remedy against A for the original debt.

ART. 46. *Nudum pactum.* The mere promise to "pay the debt of another," "without any consideration at all, is *nudum pactum*;" and a father's note to his son for love and affection is *nudum pactum*. 18 Johns. R. 145.

§ 1. Lord Mansfield said in this case, that a *nudum pactum* did not exist in the usage and law of merchants. And want of consideration is no objection in commercial cases among merchants; as where one accepts a bill of exchange for the honor of the drawer, &c. The old notion about the want of consideration was for the sake of evidence only; "for when it was reduced into *writing*, as in covenants, specialties, bonds, &c. there was no objection to the want of consideration, and the statute of frauds proceeded upon the same principle;" so as to promissory notes, the note itself is evidence of consideration, but not conclusively so, but throws the *onus probandi* on the debt. to prove a want of consideration. 2 Phil. Evid. 11; 2 Johns. R. 23.

§ 2. Wilmot J. in the same case of *Pillans & al. v. Hopkins & al.* said, that all the cases I can find of *nudum pactum* are upon *parole*, not in written promises. *Nudum pactum* comes from the civil law, "*ex nudo pacto non oritur actio*;" the notion was adopted to induce deliberation. If the promise was by stipulation, it was good, without consideration, by the Civil law; *a fortiori* if in writing. It may not however be always good when in *writing*; many cases are strange and absurd, especially *Hayes v. Warren*, Strange 983, when the judgment was reversed, because it did not appear by the declaration "to be either for the *benefit*, or at the *request* of the debt."

§ 3. In several books it is stated, that if an agreement or contract be in *writing*, the consideration is not inquirable.

§ 4. On the whole, the general rule is, that a mere general promise without benefit to the promisor or loss to the promisee, in writing or not, is a *nudum pactum*; but some acts are in themselves proof of consideration, as contracting by *bonds and other sealed instruments*; and generally *writings*, being evidence of deliberation, are *prima facie* evidence of consideration, but not conclusive, except in *law merchant* cases, and cases of negotiable contracts *negotiated*. For as between the *original* parties to such contracts, or as to those who take assignments of them when *dishonored* or *suspicious*, a want of consideration may be shewn; but not on a letter of credit or acceptance of a bill, &c.

§ 5. A and B had open accounts, and an adjustment was made between A and B's agent duly authorized, and a balance found due is paid to the agent. B was dissatisfied with the mode of settlement; whereupon A wrote to B, "*reperuse the accounts, and make out a statement according to your own wish-*

CH. 1.

ART. 4.

See art. 8, 3, &c. ch. 49, 32.—3 Burr. 1663, 1676, *Pillans & al. v. Hopkins & al.*—11 Johns. R. 60. 13 do. 52.—7 Mass. R. 14.—*Plowden* 308, 309.—*Pow. on Con.* 332 to 341.—*Imp. M. P.* 162, 392—see this matter considered in conscience, &c. *Doc. & Stud. Dia.* 2, c. 24. See 7 D. & E. 350.—Note, all contracts improperly divided into *parol* and *specialties*; for many statutes as well as reason make three kinds, un-written, written not sealed, and written sealed. *Plow.* 308, 309.—1 Com. D. 402.—2 Bl. Com. 56, 57, *Christian's notes*, —4 Johns. R. 296, the *People v. Howell*.—5 Johns. R. 272.—2 Johns. R. 442.—*Phil. Evid.* 11.—3 Mass. R. 1. to 13, *Wilson v. Clements*.

CH. 1. *es, and draw on me for the balance, which shall be punctually*
 Art. 47. *honoured."* Two years after, B, being pressed by a creditor,
 drew in favor of him a bill on A; and it was held that A was
 not bound to accept or pay this bill; for his promise was *nudum pactum*, for want of consideration; it not appearing any
 thing was due to B, at least at common law.

§ 6. In this case Dexter for the plt. admitted, that A's letter
 or promise was not the more binding for being in *writing*, but
 contended, and correctly, that there are some writings which
 of themselves prove a consideration; as my letter of credit,
 or as my acceptance of a bill of exchange, &c.

Chitty on
 Bills 70, 71,
 72.—7 T. R.
 630.

§ 7. Where the legislature has declared a contract, as a note or
 bill, void for its illegality, the illegality of the consideration, as usu-
 ry &c., the deft. may shew the illegality, though the plt. or some
 one between him and the deft. took it *bonâ fide*, and for a valua-
 ble consideration; and the innocent holder can only look to
 him of whom he received the bill or note; but unless it has
 been expressly so declared by the legislature, illegality of con-
 sideration will be no defence in a suit by a *bonâ fide* holder,
 without notice of illegality, unless he obtained the bill after it
 became due.

8 T. R. 390,
 Cuthbert v.
 Haley.—4 T.
 R. 276.

§ 8. If a contract be void for usury, &c., and a second be
 taken for the same debt, it is equally void in the hands of a
 party to the first; but not if in the hands of a *bonâ fide* hold-
 er. And see Usury. By suffering judgment by default, the deft.
 loses the opportunity to object to the want or illegality of the
 consideration, or to the insufficiency of the consideration. If
 an executor have no assets, and promise to pay the testator's
 debt, it is *nudum pactum*. 5 D. & E. 8.

10 Mass. R.
 415, Sanger
 and wife, v.
 Cleveland.

ART. 47. *Where C's note for land to a third person is va-
 lid, though C's title fails.* A and B, tenants in common of
 land as coheirs; A releases her right to B on absolute securi-
 ty, a bond; B conveys all to C with warranty; C gives his
 note to A towards satisfying the bond to her; C is obliged to
 pay a sum of money to remove an incumbrance from the land,
 and B, his warrantor, is insolvent. A sues the note thus given
 for the land, and C insists there ought to be a deduction from
 it on account of this incumbrance, the consideration of the
 note so far failing; but judgment for A for the whole note, for
 she is a *third* person, not the grantor of the land, and she had
 a clear title to claim to the amount of the note on her brother's
 bond, and the note given to her to satisfy that claim was
 given for a valuable consideration as to her, as it was given to
 pay her what she was justly entitled to.

3 Johns. R.
 100, 104,
 Powell v.
 Brown.

ART. 48.—*Consideration bad.* In *assumpsit* the plt. stated
 that he, U, and W, were joint owners of a vessel and her car-
 go, then on a distant voyage, and were jointly interested in her

earnings and the profits of the voyage ; that W was also master, and died on the voyage ; and after his death the deft., in consideration the plt. had promised him that he, the deft. should receive from the plt. W's effects in the vessel and her earnings, as W was entitled to receive them according to the agreement among the owners, and in consideration the plt. agreed with the deft. to account to him for the said vessel, and earnings, profits, &c. in like manner as he was bound to account to W ; he, the deft. promised to pay the plt. any demands or sums of money due and owing from W to the plt. at the time of W's death ; and also any demands the plt. had against W's share in the vessel ; and the plt. stated in his declaration, *a certain debt* due from W to the plt., and averred he was always ready to perform his part of the agreement, &c. On demurrer, this declaration was held bad, as it did not state a sufficient consideration of the deft's. promise ; not stated he was to receive any thing in fact.

CH. 1.
Art. 53.



ART. 49. The deft. agreed in writing to give the plt. the refusal of a farm, &c. Held necessary to prove a consideration for the promise, where the agreement is in *writing*, as well as where it is by *parol*. And though a *parol* agreement will not give a title to lands, yet the party may recover damages for the non-performance.—*Quære*.

4 Johns. R.
235, Barnet
v. Biscoe.—
4 Dallas 152.

ART. 50. As to the consideration of contracts, see many good rules in Latin and English collected by Cooper, principally from the Roman law, most of which will be found in different parts of this work, as rules and maxims have applied.

Cooper's
Just. 587,
594.

ART. 51. A contract made by parties is void, if it be of a kind to impose on the court and to interfere with the regular administration of justice.

4 Day's cases
313, Good-
win v. Good-
win.

ART. 52. So a contract made in New York is void, for the sale of tickets in a lottery authorized only by another state, and not by New York or Congress.

—6 Johns. R.
327, 335, case
of Hunt, &c.

ART. 53. *Consideration moving A to pay or do something, where B has the benefit.* Numerous decisions have given rise to four classes of cases on this subject.

§ 1. As where A collaterally assures or guarantees B's debt &c. to C *at the very time* it is contracted, and B promises to pay or do. Here the benefit done by C to B as a loan, delivery of goods, &c. is both the consideration of B's promise, and A's guarantee or suretyship, and no consideration need be stated for A's undertaking. This is every surety's case who joins in the original contract. And see cases in the margin.

Cro. El. 137,
Kirkby v.
Coles.—Will-
iams v. Leap-
er, cited ch. 9,
a. 20, s. 9,
& Ch. 50, a. 8.

§ 2. As where A, *subsequently* to B's debt &c. being contracted with C, collaterally guarantees it. These two considerations are necessary, one for B's promise and one for A's, and both must be proved. Thus *subsequently* was the guaran-

Roberts on
Frauds 232,
237.

CH. 2. tee in *Wain v. Warlters*, 5 East 10, 20; cited art. 25; also ch.
 Art. 7. 19 a. 20, s. 33; ch. 11, a. 14, and *Sumner v. Parsons*, referred
 to ch. 20 a. 14, s. 5, (in this case a questionable consideration
 was stated and proved.) See 14 Vesey 190, *Seers v. Brink*,
 ch. 11 a. 13, s. 5.

Tomlinson v.
 Gill, Ambler
 330.—*Roberts*
 on Frauds.
 232, 237.—
 See cases ci-
 ted Ch. 9 a.
 20, s. 25.

§ 3. Where B owes a duty or debt to C, and A for a *new* consideration undertakes, *not collaterally but directly*, to pay or do what B engaged to pay or do, this is not a case within the statute of frauds, (as the other two are.) But this new consideration for A's engagement or guarantee must be distinct and independent of B's debt or duty, and one moving between A and C, the parties to the *new* promise in fact *original*. See cases cited ch. 9 a. 20, s. 9; and 7 D. & E. 201; 1 Saund. 211 note 2. Hence in this 3d class of cases, A's undertaking need not be in writing.

6 East 307,
 308, cites
 5 East 10, 20.
 —See 14 Ves.
 190.—15 Ves.
 287, *Sumner*
v. Parsons.—
 American
 Precedents
 113.—See
 ch. 9 a. 20, s.
 33—ch. 11 a.
 14.—5 Crauch
 322, 335.

§ 4. Where A undertakes to pay B's debt &c., and A's promise must be in *writing* founded on a *distinct consideration*, how far must it be stated in the writing? According to *Wain v. Warlters*, the consideration moving A's promise must be stated in the writing to make his promise valid on the statute of frauds; recognized in New York in *Seers v. Brinks*, 3 Johns. R. 210, but not adopted in Massachusetts, as *Hunt v. Adams* cited and examined ch. 11 a. 14, and the Supreme Court in New York in *Leonard v. Vredenburg*, 8 Johns. R. 29, 41; allowed the consideration of such *after collateral* promise to be proved by parol evidence, as that the guarantor undertook *at the time* the original contract was made. On the whole, as to this last class the law seems to be unsettled. It is clear that prior to the case of *Wain v. Warlters*, it was not usual to require the consideration to be stated in the written *memorandum*; and the endorsement of a promissory note is *prima facie* evidence of full consideration; and why is not a guarantee of one?

CHAPTER II.

REMEDIES BY THE ACTS OF THE PARTIES.

See ch. 178
 a. 9.

ART. 1. IN *certain cases from necessity*. § 1. In some cases of necessity the party injured is allowed to seek his own remedy; to retake his property; to repel force by force; to *abate nuisances*; to take *beasts damage feasant*, &c.

3 Bl. Com. 7,
 8, &c.—
 2 Inst. 316.

§ 2. *The defence of one's self*, husband, wife, child, parent, mother, or servant, is a *natural right*, which has scarcely ever

been taken away by any municipal law. Hence if one in these near relations be attacked, another in them may lawfully repel force by force. The particular cases in which this may be done are numerous ; but one general principle holds in them all, and that is, *the defence must be regulated by the nature, degree, and design of the attack.* I may kill one who attempts to take my life, or to commit a burglary in my house, but not one who only attempts to trespass on my land. There is also another principle, the repelling force must go no further, than is necessary to prevent the mischief intended by the aggressor.

CH. 1.
ART. 5.

8 T. R. 299,
Gregory and
wife v. Hill.

§ 3. In using force there are two kinds. 1. *Gently laying on hands.* 2. *Actual force.* "There is a force in law, as in every trespass *quare clausum fregit*. As if one enter into my grounds, here I must request him to depart, before I can lay hands on him to turn him out ; for every laying on of hands is an assault and battery, which cannot be justified upon account of breaking the close in law, without a request." So 2d, there is an *actual force*, as in burglary, or in breaking open a door or gate ; and in that case, it is lawful to oppose force by force. And if one breaks down the gate, or comes into my close *vi et armis*, I need not request him to be gone, but may lay hands on him immediately ; for it is but returning *violence for violence*." "So if one comes forcibly, and takes away my goods, I may oppose him without any more ado ; for there is no time to make a request." Thus breaking a gate is *actual force*. So if one *by force* attempt to enter upon my land, I may at once use force to repel him, and need not plead *molliter manus imposit* ; which plea justifies an *assault and battery*, but not a *wounding*.

Salk. 641,
Goddard v.
Green.—
5 Com. D.
772, Pleader
3 m. 16.

8 T. R. 78,
Weaver v.
Bush.

§ 4. So if one be possessed of a house, and another attempts to put him out, he that is so possessed may gently lay hands on him to put him away. The possession is but inducement ; the attempt to put out is the material part.

Cro. Jam.
138, Thewell
v. Avery.

§ 5. So *molliter manus* may be to remove a trespasser from my house or property, after a request to depart, who does not enter with *actual force*, or who enters lawfully and remains unlawfully ; or I may use *actual force* to remove him who enters with *actual force*, or remains with *actual force*.

Willis. 14,
18, 688, ch.
91.—5 Com.
D. 772.—
Pleader 3 M.
16.—Lutch
1435, 1463,
1497.

§ 6. In all these cases the owner of the property is in the right to defend it ; and the party who invades it is the aggressor, and in the *wrong* ; and such force as he uses may be returned by the owner in defence of his property ; and if the aggressor persist in his wrong, and is repelled by a return of violence, he brings the evil upon himself. The general rule is, the owner must defend his property by *gently laying on hands* till the aggressor uses *actual force* to get or keep possession,

CH. 2. to take away or destroy it, and then the owner may lawfully
 Art. 3. return *actual force* proportioned to the circumstances of the
 case: in other words, the degree of force must be reasonable,
 all circumstances considered.

ART. 2. *By recapture.* If one wrongfully take away my goods, or detain my wife, child, or servant, I may lawfully retake either, when I can do it in a peaceable manner, without force or terror, and without disturbing the public peace. The law founded in reason considers that I may be without remedy, if I be not allowed this mode of redress, as my goods or relation may be carried beyond my reach, before I can have a remedy by suit or action. But this mode of redress is limited. If I find my horse so taken from me in the highway, common, or public inn, I may retake him; or to do this I may peaceably enter upon the land of the wrong doer. But to take my property in this case, I cannot lawfully enter upon the land of a *third* person, or break open a private stable, except it be feloniously taken. If my property, as a stick of timber, comes upon the land of one wholly innocent, though without my fault, I ought first to ask his consent to let me take it away, offering to pay him any damages I may thereby do him; and if he then refuses, he is guilty of a *concussion*; and this from the necessity of the case; for as my property comes there *without any fault in me*, I ought to have remedy to recover it, and I am without remedy unless the law be so. Any *usage* as to fruit or trees falling, making fences, &c. may be an exception to this rule.

3 Bl. Com. 8. ART. 3. *By reentry on lands; and one's going on the lands*
 —Mass. Act of others to take his goods. § 1. If one, unlawfully, or with-
 July 4, 1786. out right take possession of my lands, I may peaceably enter
 —3 Bl. Com. upon them, and regain possession. And I may do this when-
 174, 175, 176. ever his possession had a *tortious* beginning, and has *tortiously*
 —32 H. 8, continued in him less than 20 years. But if he continues
 33. his possession, though wrongfully, more than 20 years, or more
 than 5 years and dies and his heir enters, my remedy by en-
 try is gone.

Co. L. 15, § 2. This remedy by entry does not take place in the cases
 Litt. sect. of *discontinuance* and *deformement*; because in these the ori-
 417.—3 Bl. ginal entry is lawful. But it takes place in *abatement*, *intru-
 Com. 175.— sion*, and *disseisin*; because in these cases the original entry
 3 T. R. 292. is unlawful. An entry on a part in the *same* county in the
name of all is an entry on the whole. But an entry in *one*
 county is no entry in another. So an entry on *one* disseisor
 is no entry on another. So if one disseisor convey with live-
 ry, or in a mode equivalent to livery, to two *distinct* grantees
 or feoffees, there must be an entry on each. There must be

10 Mod. 369.
 —Co. L. 252.

a *distinct* act, to divest each *distinct* seisin vested in each one having seisin of a parcel of the land in *severalty*.

CH. 2.

Art. 3

§ 3. Where one who has the *right of property* rightfully enters, he has the *juris et seisinæ conjunctio*, and is complete owner. But an entry, without a right of entry, is of no avail.

§ 4. *I may go on A's land to take my goods &c.* If my goods or cattle come on the lands of A or in his house, it is often material to know when I may lawfully enter or not without his consent, and take them away, and so lawfully recover my possession by my own act, and without a suit.

§ 5. All the books agree, that if they come upon his land or in his house *by his wrong*, I may so enter upon his land or into his house, the door being open, and take them away, without his consent; for he does the first wrong, of which he shall not take advantage to retain my goods.

5 Bac. Abr.
174, 177.—
Bro. Tris. pl.
118, 186.—
4 D. & E. 365.
—2 Roll. 565,
pl. 9.

§ 6. On the same principle if he dig a ditch in *his* land, and draw away *my water from my mill*, I may enter and throw the earth back into the ditch, and fill it up by such earth hove out; for I only repair the wrong he did to my injury.

5 Bac. Abr.
176.—9 Co. 55.

§ 7. So if A take my leather, and make shoes of it, I may retake them; but not my timber annexed to his freehold. This is the general distinction. See property by accession, ch. 76.

5 Bac. Abr.
173.

See Post.

§ 8. If my fruit fall, or the wind blows my trees upon A's land, I may so enter and take away either. This is a rule of necessity. So if I lop my trees and the loppings fall on A's land, I may so enter and take them away, *if I used proper caution to prevent their falling there*; but not if such caution was not used, for the falling of the fruit or trees there *could not be prevented*, and the falling of the loppings in the first case was *wholly without my fault*. When also it is said, if A's cattle trespass on my land, I may lawfully drive them into his; this must be understood his land properly situated for their reception, and not into his cornfield or garden.

Bro. tres. pl.
213.—5 Bac.
173, 174.—
Bro. tres. pl.
213.—5 Bac.
173, 4.

Latch 119,
120, Mellen
v. Tawdry.

§ 9. If B take my cattle *by wrong*, and put them into A's land *by his consent*, I may so enter and take them away, though it has been objected that I cannot do this, except they be there by *A's tort*; and the court said, that if "the deft's. beasts be taken from him *by wrong*, and are not out of his possession by *his delivery*, he may justify the taking of them in any place in which he finds them;" but the case itself hardly supports this *general principle* stated by the court, for that stated the cattle come on the land of A *by his consent*; so he assented *ignorantly*, if not knowingly or carelessly, to B's unlawful taking. But Espinasse states the general principle above to be law; that is, whenever my goods are out of my possession *by wrong*, and *not by my delivery*, I may take them

Cro. El. 329,
Chapman v.
Thumblethorp,
imperfectly
cited 2 Esp.
106.

CH. 2.

Art. 3.

2 Roll. Rep.

55.—

5 Bac. Abr.

174-177.—2

Lutw. 1385.—

2 Roll. R. 55.

56, Higgins v.

Andrews.

wherever I find them. The same principle is stated by Rolfe and by Bacon, who says, that if my beasts be stolen and put into A's close, I may so enter and take them away, or if driven there by a stranger by A's *consent*, and for this last position cites the case of *Chapman v. Thumblethorp*, (above.) As to this position the reason is plain, it is stated and recognised by Bacon. But if my goods come upon A's land *without his assent or privy*, it is a question if I may enter to take them away, *without* his consent, at least *before request and refusal*; perhaps *after*, if he have no reason to detain them, his refusal to let me take them away doing no damage to him, may make him consenting and privy to the wrong in putting them there; then the case is upon clear ground, he converts them to his use, if he refuses, without any reason, to let me take them away at my expense and so as to do him no injury.

Cro. El. 245,

246, Taylor

v. Fisher.

§ 10. If my goods come upon A's land or in his house (the door open,) *and it does not appear how*, I cannot enter to take them without his consent.

Trespass for breaking the plt's. house, and taking a pike, &c. Plea, that before the entry one *A owned them remaining in the plt's. house, and sold them to the deft.* and he entered to take them away by the permission of the plt's. wife; plt. demurred and judgment for him to recover as to the *entry into the house, but not as to the goods*; for the court said, "the goods being in the plt's. house, *and it not appearing how they came there,*" as by trespass or otherwise, the deft. could not enter of his own head; and the *wife's license* was invalid, (should have been pleaded as the husband's and his implied assent left to the jury to be presumed.) And where a parol license to enter upon one's land or into his house is sufficient, see *License*.

5 Bac. Abr.

177.—Bro.

Tres. Pl. 430.

§ 11. If I have a right to take my goods or cattle from land or house in a given time, *as during my lease &c.* and do not, it is my own folly, and I cannot *afterwards* enter to take them without his consent.

5 Bac. Abr.

175.

But the law hurts no man; hence, if *tenant for life &c.* die, his executor has a reasonable time to enter and take away the goods. See *Emblements*, ch. 76.

2 Esp. 87,

Hatton v.

Coles.

§ 12. If my goods or cattle come upon A's land, *without any fault in him or me*, I may enter and take them away *as the owner of the property*. Hence, if my beast be an *estrays* on his land, and he seize it as such, I may enter and take it, and he may have an action on the case for the keeping, or retain till paid; that is, I am not a *trespasser* by my entry, unless he claims his *lien*, and I refuse to pay or satisfy it.

§ 13. So I may enter to take them out of his land when *both are in fault*, as where we both ought to repair the fence,

and neither does, and my cattle get into his land ; but when *both are in fault*, or *he is not in fault*, I must do him no damage, or prevent a greater damage. When he is innocent he is to suffer no loss. CH. 2.
Art. 5.

§ 14. If my goods or cattle come upon A's land, *without any fault in me*, and he has no *lien* on them or right to detain them, I may enter and take them away without his consent, so is the case of the fruit, the estray, and loppings above ; but if by any fault or carelessness of mine, I cannot enter, so is the case of the loppings, I carelessly let fall upon his land. So if I buy B's goods being in A's house, and it does not appear how they came there, I cannot enter. So was the above case of the pike ; for if B had a right to enter and take them, I cannot buy that right. But whenever my goods come upon A's land by *his fault or assent*, I may enter and take them away, unless he has a special *lien* upon them, as in case of right to retain as a tavern keeper may have &c. On the whole, if my goods come upon A's land, and neither is in any fault whatever, but they come there by *accident* or by a *stranger's* act, I may enter and take them *doing no wrong to A*, but if there be any damage done to him by my taking them away, this damage must be my loss and not his, for it arises in my affair.

ART 4. *Abating nuisances by the party injured.* Such is the nature of the wrong that an immediate remedy is necessary. Hence, if one erect a gate across a way, which ought not to be there, any one who has a right to pass the way may remove it ; so if any one erect a building, shed, or wall, so as to obstruct my *ancient* lights, though on his land it is a *private* nuisance, and I may peaceably enter on his land and pull it down. So if he has a hog-stye or other thing on his land, that corrupts the air in and about my house, and makes it unwholesome, I may lawfully remove this nuisance ; for before there can be a remedy by suit the health of my family may be destroyed, and he occasions the first wrong or injury.

ART. 5. *Taking chattels damage feasant, in what cases, &c.* 3 Com. D.
522.—3 Bl.
Com. 6, 10,
11.—1 Roll.
666.—
6 T. R. 138,
Story v. Rob-
inson.—4 D.
& E. 560.—
1 Sul. Lect.
201, 202.
§ 1. Chattels doing damage or trespassing on my land may be taken by me, by day or by night, and restrained by me, as a pledge for the damage done to me ; and if a *stranger* put the cattle of A upon my land, without his privity, I may distrain them *damage feasant* ; but a net one carries in his hand cannot be distrained *damage feasant*, nor a horse one rides over my corn. Blackstone and some others, however, have held otherwise.

§ 2. *To take damage feasant*, the taker must have the *freehold* in the land, or hold under him who has it. Therefore the deft. in replevin must plead he has the *freehold*, or that B

CH. 2.
Art. 5.

5 Com. D.
746, 781.—
Litch. 740,
1232.—
Cro. El. 530.
2 H. Bl. 366,
Willes v.
Fletcher.—
12 Mod. 397.

7 D. & E. 431.
—5 T. R. 329,
Burt. v.
Moore.—Co.
L. 4.

Feb. 14, 1789,
sect. 3.

10 Johns. R.
263, by the
act in N.
York (sect.
524, Ch. 78)
the distrainer
must have
the damages
ascertained
by two fence
viewers before
he impounds
them, if not,
is a trespasser
ab initio.—3
Bl. Com. 10.

has it, and he, the deft., took the *cattle damage feasant* as B's servant, and if he say that he himself or B was seized, he must state of what estate, whether in fee, in tail, or for life: for of what estate he is seized the court and other party ought to be informed. 2 Ld. Raym 1589.—Cro. El. 75, 628.—Willes 623.

§ 3. *One tenant in common* cannot avow alone taking *damage feasant*, he must also make cognisance as bailiff to his co-tenant. If one seise *damage feasant* and lose the pledge, he cannot take again. A tenant holding over after his lease is expired cannot distrain *damage feasant* the landlord's cattle put on the land.

§ 4. One entitled to the *grass or feed*, may distrain *damage feasant*, shewing how he is entitled, as where A, the owner, leases to B for a year, the milk and calves of twenty-two cows to be fed by A in a certain pasture, and B to keep a mare in it, and no other cattle to feed there, &c. B is the occupier and may distrain other cattle of A there put in; for B has the *separate herbage* and feeding, and the sole right to the use of the thing is the same as a right to the *thing itself*. So one having the herbage of the land may distrain or have trespass.

§ 5. *By Mass. act* it is provided, that if any person be injured in his tillage, mowing, or other lands *under improvement*, "that are enclosed with legal and sufficient fence," in a common field, or by itself, by swine, sheep, horses, or neat cattle, he may impound them, (or have trespass) aided by a field driver or not, in the town pound or in a place of his own; but he must feed them and give notice to the owner of them, if known, in twenty-four hours, and written notice to the pound-keeper of the damage done and the cause of impounding; and if the owner of the cattle think the damages demanded unreasonable, he may have them ascertained by two or more appraisers appointed and sworn by a justice of the peace. And if the owner do not pay them and charges, or replevy in twenty-four hours after notice, the injured party may, by such appointment, have enough of the creatures appraised and delivered to him to pay him.

It will be observed that this statute distress can be only when the lands are *improved* and are *sufficiently fenced*, except where cattle are turned in, and it may change the property in the beasts distrained; differing in both respects materially from the *common law* distress. For at common law the beast taken *damage feasant* can only be held as a *pledge* for the damage done, and the occupier of the land may distrain, though it be not under improvement, or, in some cases, legally fenced. Indeed, by the fifth section of this act, in trespass or replevin for the creatures taken *damage feasant*, the

justice or court may give judgment for the occupier of the land, if it be proved they were *clandestinely turned in*, or broke in where the fence was *legal*, though some other parts round the same close be not so.

CH. 2.
Art. 5.

§ 6. In Marblehead there was a common and general field inclosed, in which Glover and others had several lots; the lot of each proprietor being known by *metes and bounds*. Glover distrained Bassit's oxen, *damage feasant* on one of the lots, but not Glover's, and impounded them, but did not leave with the pound-keeper (the other deft.) any account in writing of the damages, and the court held this was fatal, for a statute authority, that authorizes one man to take and impound the property of another, must be strictly pursued. The jury gave \$70 damages, the value of the oxen and amount of damage the plt. had sustained. The fact in the case, that Glover did not find the oxen on his lot, was not fully considered.

Mass. S. J. Court, Nov. Term 1799, Bassit & al. v. Glover.

§ 7. On the principles of the *common law* the occupier of the land may distrain beasts *damage feasant* then, in three cases. 1. When the whole fence round the land is *legal*. 2. When *his part* of the fence is *legal*. 3. Though not legal, if the beast be at large in the highway, not merely passing there, and get into his land; or if they be *trespassers* in the adjoining land and get in; or as it is understood, if it can be proved they got in over fence, he was not bound to repair. The reasons are these: the occupier of a close or pasture is bound by law to have his fence legal, only as it respects the *adjoining* lands, and only against beasts *lawfully* there, and not against those *trespassing* there, or *trespassing* in the highway, as all creatures are, which *feed* or remain there, and are not merely passing there, or allowed by some statute law to feed there. Cattle may lawfully pass in the highway, but they cannot feed in it. 5 Bac. Abr. 208, *Baker v. Andrews*. It is an easement merely for passing, not for feeding.

2 H. Bl. 627, &c., Dovaston v. Paine. —5 Bac. Abr. 183, 184.—4 Mass. R. 471, Melody v. Reab.—6 Mass. R., Rost v. Low, &c. Baker v. Andrews.

§ 8. A distress *damage feasant* is allowed, because it may be impossible for the injured party, at a future time, to find whose cattle they were that did the damage.

3 Bl. Com. 6.

§ 9. This distraining *damage feasant* is a *summary* remedy, "the distrainer must take care he be *formally* right. He must seize them in the act upon the spot; for if they escape or are driven out of the land, though after view, he cannot distrain them;" but he may take them in his close and drive them along the road to pound.

Cowp. 417, Lindon v. Hooper. 3 Wils. 295, 297, Mattra-vers v. Fosset.—3 Bl. Com. 12. 6 Co. 76, case of Pilkington.

§ 10. The owner of the beasts may rescue them if not lawfully taken, *before impounded*; but not after, for then they are in the *custody of the law*. So he may tender amends before impounded, but not after; but a tender to the bailiff is not good.

CH. 2.

Art. 6.

Mass. acts,
Feb. 24, 1786,
sect. 5.

§ 11. But the sixth section of the said statute of Mass. forbids any rescue of a distress made on that act; and in the *qui tam* action on it, its *illegality* cannot be pleaded.

§ 12. By this act it is provided, that if any proprietor in any common or general field put in any creature above his number allowed him, or before the day agreed on, or keep in after the time set by a major vote of the proprietors, he is deemed a trespasser, and such creature may be taken *damage feasant* by any one of the proprietors.

§ 13. If a tenant hold under two tenants in common, and pay all the rent to one, after notice from the other not so to pay, the other may distrain for his share.

§ 14. The implements of one's trade may be distrained in certain cases, where not in *actual use* or exempted by statute. Where a distress escapes, though against the distrainer's will, there is no remedy for the same damages. He had his election to have trespass or to distrain, and he makes his election to distrain. His action of trespass is then gone, and when he lets the creatures distrained escape he loses his pledge by his own fault, and cannot distrain again. So no remedy remains. But suppose at common law, the owner of the beasts lawfully distrained rescues them going to pound, must not the distrainer have an action for the rescue, or be restored to his action of trespass. But this question cannot arise under our statutes, because that forbids such rescue.

ART. 6. *By accord and satisfaction.* § 1. This also is a remedy by the act of *both* parties; and is, when the injury is done and considered, and one agrees to give, and the other to accept something in satisfaction of it. As this is a remedy by consent and agreement, the parties must necessarily be of age, and capable of contracting. The principle is this: if I have a right to demand and receive money or property of one for debt, or damage, or otherwise; I may by law, for some good consideration, release to him, and whatever I can release to him, I can relinquish for something I deem a satisfaction, and thereby bar my demand. But if my demand be grounded on a *deed* or title to *real estate*, my remedy is not gone by this *accord and satisfaction*, because a maxim of law applies, to wit: "*unumquodque dissolvi eo ligamine quo ligatum est*;" or when my right is proved by evidence of a higher nature, as by *deed*, or by evidence, which gives me title to *real estate*, this right cannot be done away by evidence of an *inferior* nature, as accord and satisfaction is. And in the application of the *rule, unumquodque &c.*, a distinction has been truly taken which narrows it; as where A leased lands &c. to B, who assigned them to C, against whom A brought covenant for not *repairing the house*; and C pleaded an accord between him

5 T. R. 246,
Harrison v.
Barnby.—3
Bl. Com. 1,
Christian's
notes.—11
Mod. 21—24,
Jasper v. Fa-
dows.

2 D. & E. 24,
28.—5 East
230.—5 D. &
E. 141.

Cro. Car. 193.
—2 Wils. 376,
Payne's case.
—3 East. 251.
—6 Co. 44,
Blake's case.
—3 Wood's
Con. 588.—
Cro. J. 99.—
1 Esp. 148,
261, 371.—
Cro. El. 304,
541.—1 Stra.
424.

and A, and satisfaction thereof. A demurred and the plea was adjudged good; for the above rule did not apply. But this rule only applies when the duty arises or accrues *by the deed itself in certainty at the time of making it*, as by a bond &c. to pay a sum of money. Here the certain duty takes its essence solely by the deed, and in no degree from any subsequent act or event, and so ought to be avoided by matter of as high a nature, that is, by *deed*. "But when no certain duty accrues by the deed, *but by a wrong or default subsequent, together with the deed*, an action is given to recover damages, which are only in the *personalty*, for such wrong or default; accord with satisfaction is a good plea;" as in this case a *deed to repair and the subsequent neglect to repair*. "The covenant doth not give the plt. at the time of making it any cause of action, but the default or wrong after in not repairing," with the deed, gives an action to recover damages. Both the *deed* and *this default* are essential to the support of the action—Does not appear whether the accord was before or after the covenant was broken.

CH. 2.
Art. 7.

§ 2. It is laid down as settled law, that "in all cases where *arbitrament* is a good plea, *accord and satisfaction* is a good plea;" and generally, in all cases where *damages only* are to be recovered, arbitrament, or accord and satisfaction is a good plea. So either is good in mayhem, in waste against the lessee for years, &c.

§ 3. *Accord and satisfaction* is a good plea in *ejectione firmae*, in the English practice; but a right or title to a *freehold* cannot be barred by any accord with collateral satisfaction; and if divers things are to be performed by accord, all must be performed. The accord was for a trespass &c. committed

§ 4. *Accord and satisfaction*, with one trespasser, discharges all of them. The best manner of pleading accord and satisfaction is to say, that *one gives \$5 in full satisfaction, and that the other accepts this in full satisfaction*. Such giving and such acceptance are both essential to make this remedy valid; and also, it must appear the satisfaction is *a good and valuable one, and complete and executed*; and so it must be shewn what it was.

§ 5. Of late it has been said, that on *mutual* promises an action lies, and consequently, there being equal remedies on both sides, an accord may be pleaded without execution, as well as an award. And formerly it was held, that an award, except in certain cases, could not be pleaded to an action, unless it were executed. As accord and satisfaction is a plea in bar in assumpsit and other actions, it will be further considered in future chapters. See 5 Johns. R. 386, 392.

ART. 7. *By arbitration*. § 1. A remedy by arbitration is so

9 Cro. 77, 78, &c., Pentor's case—2 T. R. 24, 28.—Stra. 426.—4 Cro. 1, Vernon's case.—1 Bac. Abr. 223.—Stra. 573.—1 Esp. 261, Payne v. Masten—2 Wils. 86, Weston's case.—5 Co. 117, 118, Fennel's case.—12 Mod. 85.—1 Raym. 60, 122, 460.—1 Bac. Abr. 223.—Cro. El. 66, Han v. Gorge.

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Art. 7.



far one by the act of the parties, that no recourse is had to legal process, unless one party refuse to perform the award; as an *award* is often a plea in bar in assumpsit and other actions, and is, also, often the foundation of an action, it will be considered, for the most part, under the heads of assumpsit and debt; and only a few things will be noticed here, and some few in pleadings.

§ 2. The ways of submitting to arbitration are many; as by bond or covenant, in writing or by parol, all demands or some demands particularly specified. So that the award be made generally or by such a time; by all the arbitrators, or by a major part of them, in writing or in writing under seal, &c. The law in regard to awards has been materially altered in two centuries. Ancient niceties and strictness are now rejected; and the courts of law, as well as courts of equity, principally regard the intentions of the parties submitting and of the referees.

§ 3. It is, however, still a legal question of some nicety, when an award extinguishes the old cause of action; when it does not, that may be again referred or sued. But neither when the award extinguishes it. The general principle is, that the award extinguishes it, whenever it gives a new cause or ground of action. But there are some exceptions to this rule; for in some cases the party in whose favour an award is made may sue on that, or resort to the former cause of action, and in some not; and it is only in the latter case the award finally settles any matter between the parties, by their act &c. and without legal process.

Cro. El. 66,
Han v.
Gorge.

§ 4. Anciently there were some decisions that an award did not bar the former action, unless performed or executed. Hence in trespass, the defts. pleaded an award in bar, that the defts. should pay to the plt. 20s. &c. but did not plead payment; to which the plt. demurred, because he did not plead performance of the award, and the demurrer was allowed by the court. This is not the law now.

49 E. 3. 3.—1
Bac. Abr. 224.

§ 5. It has also been held, that if the award be, that the deft. pay a sum of money at a certain day in satisfaction of an action, and fail to pay at the day, the award is no bar, for it is his fault he does not pay according to the award. And in this case he shall not compel the plt. to sue on the award: but a tender of payment is equal to a performance. So if the party entitled to receive, neglected performance on his part.

Rol. Abr. 267.
—1 Bac. Abr.
224.

§ 6. But now the established rule is, that an award *without performance* is a good bar to an action on the case, if the parties have *mutual remedies* against each other to compel an execution of the matters awarded, but it is otherwise where there are not *mutual remedies* to enforce performance. And

if the award be void, and the plt. has no remedy on it to enforce performance, it is no bar to the action. And if an award be right, the court will not intend it otherwise, and in order to set it aside the mistake must be plain and gross.

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Art. 7.

§ 7. And whenever an award is only as to a *particular* matter, it must be so pleaded, and not as to a general *indebitatus assumpsit*; as where the award extends to certain grain only, then it extends not to a *general indebitatus assumpsit*; but if an award be general and valid, it may be in bar of all the promises generally: for when the deft. pleads on award after the promises made, he admits the plt. has cause of action on them, but that he is barred by the award, and this bar can extend no further than the award goes. And the admission even of the colour of an action is sufficient to prevent the pleading amounting to the general issue.

Loft 34, 664.

Carth. 187,
188.—1 Bac.
Abr. 226.

§ 8. So an award is no bar, where nothing is awarded, that will bear an action, though mutual releases be awarded.

12 Mod. 423.
—1 Bac. Abr.
227.

§ 9. An award decides the right as effectually as a judgment at law, or a decree in chancery; and is as binding, till regularly set aside in a proper manner.

§ 10. It is said that awards must be *mutual*; this means no more than that where a sum of money &c. is awarded to one party, there must be money &c. or a *discharge* to the other, by release or otherwise. And if it appear "by the general tenor of the award, that the thing awarded to be done on the one side, was intended as a recompense for injuries sustained by the other, that is considered as rendering the award sufficiently *mutual*, without any words of discharge."

Kyd on
Award 148,
163.

§ 11. And it is now settled, "that it is not necessary that the award itself should express that a sum, awarded to be paid, or an act to be done in favour of one of the parties, shall be in satisfaction; or that it should contain any equivalent expressions: a discharge to the other must necessarily be presumed from the payment of the sum or performance of the act."

§ 12. An award performed is a bar to an action for a matter submitted and awarded upon, till regularly set aside; nor can the plt. in such action attack its validity, by alleging fraud in the party obtaining. This decision must have been on the ground, that an award is in the nature of a judgment, rendered by men appointed by the parties, and not to be indirectly impeached; and it has been also decided, that monies voluntarily paid on an award, cannot be recovered back, while it shall remain, and not set aside in a regular manner, as in the case of a judgment of court.

1 Day's cases
in error 130,
134.—1 Esp.
R. 377.—
Peake's R.
187.

§ 13. Submission of all matters pending in court. The award was, 1, that all suits between the parties cease; 2, that the deft. pay the plt. £10 in full of all demands, and give a

6 Mod. 33,
Squire v.
Trevitt.—2
Ld. Raym.
961.—1. Salk.
74.

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Art. 7.



release from the beginning of the world to the time of the award; 3, that on the receipt of the £10 the plt. give a like release to the deft. This is a final award, and extinguishes the cause of action; and to tender the £10 is the same as paying it, and "determining a suit determines the right of the thing; because there is no remedy but by suit." But a release of an *action* does not bar a right of *entry*, and as to the release to the time of the award, for no cause of action shall be understood between the time of the submission and of the award, unless shewn, and if any appear the party may say, "he tendered a release to the time of the submission." The bonds and promises by which awards have been made effectual remedies by the acts of the parties, have been numerous and variant, some concise, some prolix, &c., but the best forms are unquestionably those collected from good pleadings, and are to be seen in the subjoined notes.

NOTES.

THE penal part of an arbitration bond is in common form. The following condition is in the case of *arbitration* and *umpire* both; if no *umpire*, the first part applies.

The condition of this obligation is—Whereas certain differences have arisen between the parties, and they have agreed to submit the same, and all disputes, trespasses, and demands between them, to the award and determination of A, B, and C, or the major part of them. Now if the said O shall abide by, keep, and perform the said award and determination of the said arbitrators, or the major part of them, upon the premises, provided their said award be ready to be given in, in writing on or before —. But if the said arbitrators do not make such award of and concerning the premises, by the time aforesaid, then if the said O on his part shall, in all things, well and truly abide by, keep, and perform the award, arbitrament, and umpirage of D, umpire indifferently chosen between the parties, to end the said matters and differences; so as the said umpire do make his award and umpirage of and concerning the premises, and deliver the same in writing under his hand and seal to the said parties, on or before —, then this obligation to be void, else to remain in full force. Signed, sealed, &c.

The substance of an award or umpirage is in this form—generally best to be written on the rule, &c. or submission: We [referees] or I [umpire] [as the case may be,] within named, having notified, met, and heard the said parties, their obligations, and evidence, do award, order, and adjudge, that the said — his executors or administrators, shall pay or cause to be paid to said — his executors or administrators, the sum of — on or before — and that on the payment thereof the said — and said — shall at their proper charges make to each other a general release of all matters, actions, causes of action, bonds, &c. and demands from — to — or the conclusion instead of releases may be to pay in full, &c.

CHAPTER III.

CH. 3.

Art. 1.



OF ACTIONS GENERALLY.

ART. 1. *Action what.* § 1. "An action is a lawful demand of one's right," *Actio est prosequendi quod sibi debetur in judicio.* The word *action* is sometimes used in a more limited sense, as when it is said, that a suit till judgment is regularly called an action, but not after; nor is a writ of error an action, but only a commission to the judges to examine errors; sometimes in a more extensive sense, as when it is said a *scire facias*, or any writ by which the plt. may recover, is an action. When the remedy is gone, the right is gone. A *qui tam* action or debt for a *penalty*, is a *civil action*—a mere party suit. See 3 Bl. Com. 116.—Co. L. 284, 289. What is the commencement of the action. See Ch. 29, a. 7. Cowp. 382.—1 Gil. L. Evid. 266.—3 Salk. 5.—12 Mod. 228.

1 Bac. Abr. 143.—6 Mod. 34.

But an action does not include an *information*, nor the term *party*, the *king*; nor, a *fortiori*, the state. All law terminates in actions or prosecutions.

§ 2. *Actions are*, 1, *personal*; 2, *real*; and 3, *mixed*. Personal actions are founded on *contracts* or *torts*. By *personal* actions a man demands a debt, or damages in lieu thereof; or damages for some injury to his property, person, or reputation. By *real* actions the demandant demands real property only, as lands, or rights issuing out of lands. By *mixed* actions the plt. demands real property; also personal damages for any wrong sustained, as in waste in England, and in several of the United States, the part of the inheritance wasted, also treble damages.

3 Bl. Com. 117, 118.

§ 3. Personal actions are *ex contractu* and *ex delicto*. The last are on force or fraud. Every real action is *possessory*; that is, of the demandant's own possession or seisin; or *ancestral*, that is, of the seisin or possession of the demandant's ancestor. *Ancestral* actions are two fold. 1. Where only a bare right descends. 2. Where the ancestor *died seised*, and the *land descends*, and one intrudes into the land after it descends.

1 Bac. Abr. 28.

6 Co. 4, 6.

§ 4. Though in allowing a party to choose his kind of action, the law regards substance more than form: yet the plt. cannot convert an action founded on a *contract* into a *tort*, so as to affect the principles of the case to the deft's. disadvantage; as to charge an *infant*, for instance, for a *tort*, where he made a *contract*; as where he contracts to hire a horse to ride, and he rides him immoderately; but the plt. may waive a *tort*, and go only for the value of the thing taken by the deft., for this is for his advantage. As to the numerous sorts of actions the principles &c. of them in detail, see other chapters.

Jennings v. Randall, 8 T. R. 335.

Real actions what, 2 T. R. 700.

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Art. 2.

Co. L. 128.—
Imp. M. P.
46, 47.—Coo-
per's Pl. 24,
248—246,
Harden v.
Fisher.—1
Wheat. R.
300.

Calvin's case,
7 Co. 1—56 &
Cro. Jam.
539.—Coo-
per's Pl. 24,
27, 246, 248.
—9 Johns. R.
303.—Troup
v. Mullender.
—7 Johns. R.
214, 217.—
Gardiner's
case.—Flu-
cher's case,
also 4 Wheat.
R. 463—465.—
Palmer's
case, Essex
Nov. 1801.—
1 Mass. R.
256, Sheaff v.
O'Niel, also 1
Bos. & P. 48.
—1 John. Ca.
401.—4
Cranch 209,
M'Ilvaine v.
Coxe, 321,
323.
See Ch. 131,
as to estates
by aliens—
construction
of, 4 Wheat.
R. 463, Orr v.
Hodgson.—
Seisin not
essential, and
this article
includes only
British sub-
jects and cit-
izens of the
U. States,
and confined
to English-
men and
Americans.
See 6 art. of
the treaty of
1783.

ART. 2. *Who may be plt. in our courts, and maintain ac-
tions.* § 1. As on general principles, every person has a right
to legal security in regard to his property, person, and reputa-
tion, he may be a plt., or a *competent person to prosecute*,
unless under some *legal disability*. These are ; 1, persons
outlawed, being in their *own right*, but if they sue in *auter
droit*, as executor, administrator, and officer in a corporation,
&c., they are not disabled, for those they represent, and whose
rights are the objects of the suit, are entitled to their law.

§ 2. *Aliens.* They cannot bring a real or mixed action
generally ; for aliens cannot have or hold real estate in the
United States, except certain *British* subjects, who held real
estate here when independence was declared, [July 4, 1776,]
and who continue to hold the same ; as the separation of the
two countries did not *divest estates previously vested*, but only
created in one become an alien, an inability to *take* any real
estate afterwards. Hence, and on the principles of *Calvin's*
case, those British subjects who on this separation became
aliens, and then held real estates in the United States, and still
own them, may sue for and recover them, if disseised, and in
the Federal courts, by the provisions of the Federal Constitu-
tion ; and on the death of such a subject, so seised of real
estate here, it descends to his next akin, *being citizens*.
Hence, when Dr. *Gardiner* so become an absentee and alien,
and died in 1786, seised of such estate on the river Kennebec,
his devisees, in July 1799, in the county of Lincoln recovered
; and it is the settled legal opinion, that his children alone,
who are *citizens*, inherit his undivided estate in Massachusetts ;
and that such of his children as became *aliens* on this separa-
tion are wholly excluded. So as to the estate and children of
Mr. Fleucher, and other such aliens. And a *citizen* may re-
cover a share in the estate of a *citizen* deceased, though the
demandant claim *through an alien*, and this on the *British
Statute* of the 11 and 12 of Wm. III. adopted here. See
Folliot v. Ogden, 1 H. Bl. 123—136, parties become aliens.

§ 3. It has been decided in Massachusetts, that an *alien*
can purchase and hold real estate, till office found, that he can
grant the same, and his grantee can maintain an action to
recover it, and may declare on his own seisin in fee. One
born in N. Jersey before 1775, and joined the British in 1777,
and has ever since adhered to them as a *British* subject, is not
an *alien*.

§ 4. By the ninth article of the treaty between the *United
States* and *Great Britain*, made Nov. 1794, "it is agreed,
that British subjects who now hold lands in the territories of
the United States, and American citizens who now hold lands
in the dominions of his majesty, shall continue to hold them,

according to the nature and tenure of their respective estates and titles therein ; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives ; and that neither they, their heirs, or assigns shall, so far as it may respect the said lands and the legal remedies incident thereto, be regarded as aliens." By this provision, British subjects, their heirs, and assigns, though otherwise *aliens*, may hold, sue for, and recover such lands here, as native citizens may, (many lands in the United States are subject to this provision,) but cannot recover in time of war.

§ 5. By the 11 Art. of the treaty made between *France* and the *United States*, in Feb. 1778, it is provided, that *the goods, or things moveable or immovable* of American citizens in France, may be disposed of by them as they pleased, and that their heirs might inherit them, subjects of the United States, residing whether in France or elsewhere. There was a similar provision as to the estates of Frenchmen in the United States. *Biens meubles et immeubles*, are the words in the original treaty. *Biens* in the French law means " estates ;" *biens meubles*, personal estate ; and *biens immeubles*, real estate. Before this treaty was made void, a few Frenchmen *aliens* acquired lands in the United States under it, which they hold, and will continue to hold as long as they live. And according to the case above, of *Sheaff v. O'Neil*, they can till office found grant them, notwithstanding the treaty has been declared void, but it is conceived they have not a legal capacity to transmit them by descent. This article involves the *droit d' aubaine*. Where a prisoner of war, a neutral by birth, may sue, see 8 East 287 ; 1 Bos. & P. 168 ; 2 do. 268.

§ 6. In this case it was held that the plt., who left this state after April 19, 1775, went to and resided in the British territories till early in 1780, and then returned to the U. States, and before the treaty of peace, was not an *alien*, but a citizen ; and that the Act of April 30, 1779, operated as no disqualification upon him, as he was not prosecuted and convicted under it. Same *Gardiner v. Ward jun. &c.* p. 244, &c.

§ 7. But in the case of *Palmer and wife v. Downer*, it was holden, that one Downer, who was taken and carried into Boston by the British, in the summer of 1775, went with them to New York, and there held an inferior office under the British government, and after the peace in 1783 settled in Nova Scotia ; thereby became an *alien* to the United States, and that from 1775.

§ 8. Aliens generally in regard to actions, in different situations have different rights. An *alien friend* may have a

CH. 3.
Art. 2.

If an alien enemy be permitted to live in the U. States, in time of war, and not ordered away by the Executive, a license is implied, and he may sue and be sued ; 10 Johns. R. 69, 75, 117, 183. —Institutes of the French Law, by Argou. — Domat's Civil and Public Law. — French Civil Code enacted 11th and 12th years of the French Republic.

2 Mass. R. 236 to 266, Kilham v. Ward jun. — See French Treaties of 1778, & 1800. 2 Wheaton's R. 259, 278.

Nov. Term 1801, Essex, Palmer v. Downer.

4 Mass. R. 481. — Lit. sect. 198. — Co. 16, Cro. Ch.

L. 129. — Dyer 2. — Litt. sec. 198. — Co. L. 129. — Salk 46. — Cro. El. 683. — 7 Co. 9. — Foster 186. — Stra. 1062. — Mod. 431. — 1 Com. D. 415, 416.

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Art. 2.



personal action, but no real or mixt action; but an *alien enemy* can have neither, except he may sue as *executor* or administrator, for the reasons above; and Co. L. 129. So he may sue if he have a *safe conduct*, or a *protection*; *Wells v. Williams*. So if an alien come into the country in a time of peace, as the *French protestants* did, and remain after the war takes place, he may maintain a personal action; and there is no difference between an alien Christian, and an alien infidel. Plea alien enemy, Stra. 1082; Cooper's Pl. 24.

3 Barr. 1734,
Ricord v.
Bellingham.

§ 9. So the captain of an enemy's ship may sue on a ransom bill, given in a time of war, by a British master for the redemption of his captured ship. For this contract, like a treaty with an enemy, arises out of an act of hostility, and is binding, and is not an illegal contract with him. Sued after the peace.

6 T. R. 25 to
28, Brandon
v. Nisbitt.—
1 Dal. 71.—
3 Dal. 1.

§ 10. But in a subsequent case, it was observed, that that action, *Ricord v. Bellingham*, was brought after the peace made in 1763. And in this after case it was said, that no *alien enemy* can maintain an action. This was an action on a policy on goods in an *American ship*, at and from London to Bayonne, brought by Brandon, an agent, who in his declaration averred the policy was effected for A, B, C, D, and E, interested in the goods. Pleas that these persons were *aliens*, and before the ship sailed were *enemies*. Replication, that they owed the plt. beyond the amount of their interest in the goods, &c. General demurrer. Judgment for the deft., on the ground an action will not lie either by or in favor of an *alien enemy*. No case found of such an action. In this case were cited the above and also *Winch v. Kuly*, 1 T. R. 619; *Bristow v. Towers*, Dougl. 250; *Planch v. Fletcher*; here it did not appear the goods were French property; *Anthony v. Fisher*, Dougl. 648, 649; 1 Bl. Rep. 563. See more on this head of *alienage*, plea in abatement, and in bar, for it, and ch. 131, alienage at large. An Englishman living in, and carrying on trade under the protection and for the benefit of a hostile state, cannot sue in England. See 1 Bos. & P. 163, 345; 8 D. & E. 548; 8 East 273; 9 East 321; 8 Bos. & P. 97. Who is an alien as to commercial purposes of a hostile character. See Chitty's law of nations, 31, &c.; 1 Bos. & P. 163; 5 Rob. R. 161; 3 East 332.

3 Bos. & P.
113, M'Con-
nel v. Hector.

§ 11. *Persons convicted*. As to these the laws are different in different states. Wherever the law allows a man to have property, it gives him an action to recover it. And how far one convicted of a crime has property must depend on the law of the land. Every citizen has a capacity to have property till the law disables him to have it.

§ 12. Judge Blackstone states it as a principle, "that all

property is derived from society," and is a civil right, and may be forfeited by violating the municipal law, and the state may justly resume, on this account, one's portion of property, or any part of it, this law has assigned him, and that a forfeiture is a punishment annexed by law to some illegal act or negligence. These principles are clear, but the question still is, how far our law has extended this forfeiture; and of course, how far it has disabled a person convicted of a crime to sue. See Forfeiture post.

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1 Bl. Com.
299.—2 Bl.
Com 267.

§ 13. It is clear that the English laws, in regard to forfeiture and punishments in *capital* cases, have never been adopted in the United States.

§ 14. By the 3d art. sect. 8, of the Constitution of the United States, no attainder of treason can work corruption of blood or forfeiture, except during the life of the person *attainted*. Nor is any forfeiture, by English or American law, incurred by *verdict*; but only by *judgment*.

§ 15. By a law passed in the colony of Massachusetts A. D. 1641, it was enacted, (among other things,) that there should be no forfeiture for, or upon death *judicial*. And there is no statute, or clause of a statute, of the United States or of Massachusetts, that respects the forfeiture of estates, real or personal, for crimes, except said law of 1641 and Massachusetts treason act of 1777, or except certain sums, or fines, or specified portions of property.

Colony laws
1641, Death
Judicial.

§ 16. Upon these principles, in Massachusetts Sup. Judicial Court, in Nov. 1795, one Blackburn was convicted of murder, and had sentence of death passed upon him for killing with a sword, and executed; and he had some property, but no inquiry was made concerning it, or the weapon as a *deodand*: nor is it recollected that any inquiry has ever been after the property generally, of one capitally convicted and punished in Massachusetts, or in the courts of the United States.

Blackburn's
case.

ART. 3. *How in actions several persons may be plts., and general forms in suing.* § 1. When several persons join in an action, it must be in a certain form prescribed by law. Therefore the wife must be sued with her husband, whenever injured in her person or property, and the injury be of a nature to survive with her; but not if she has a separate maintenance, or if the wrong be to the damage of the *husband only*.

Co. L. 132.—
Salk 119.—
Imp. M. P.
51.

§ 2. In some cases the law gives her an action, even against her husband, as where one *Wheeler* and wife were divorced from *bed and board*, in Massachusetts, and he was decreed to pay her a quarterly sum. This being in arrear, she brought an action of debt against him for certain arrears, and on de-

Essex Nov.
Term 1800,
Wheeler v.
Wheeler.

CH. 3. murrer, the court held the action lay, from the reason and necessity of the case.

Art. 3.

§ 3. So if the husband is banished or has abjured, he is *civiliter mortuus*, and the wife must sue as a *feme sole*. And so if she have a separate maintenance. But see *Marshall v. Rutton*, post.

Co. L. 133.—
12 Mod. 603.
—1 T. R. 5,
Corbett's
case.—3 Bl.
Com. 464.—
Co. L. 135,
Imp. 51.

§ 4. So an *infant* must sue by his guardian or next friend, who is any person that will undertake his cause, in which case the deft. is called upon to answer to the minor who sues by A. B. his next friend or guardian, &c.

Co. L. 247.—
1 Rol. Rep.
41, Pigot's
case.—Mass.
Statutes.
3 Bac. 339.—
2 Wils. 3.

§ 5. So an *ideot*, one *non compos mentis*, or any one under guardianship, must sue by his guardian, and it must be expressed that he sues by him as guardian.

§ 6. If a *feme covert* or a minor, join in a contract with A, he must be sued alone, for it binds him only. This is the legal operation, and in this case it must be pursued.

1 Bos. & Pul.
346.—1 Mar-
shall 219,
Vignier v.
Swanson.

§ 7. There are some cases in which one may sue, on a writing or contract, in which he is really interested, though not named in it. As where *Grandelos* and Company got insurance made, but were not named as agents in the policy, for De Vignier, their principal, Vignier, though not named at all in the policy, was allowed to sue and support his action. It was averred in the declaration, the interest was in him; though it was objected that *Grandelos* and Co. should have been named agents on the 28 Geo. 3. But it is understood that this policy was, as in the case of *Wolf* and *Horncastle*, in the English form, that is, "as well in their own names, as for and in the name or names of all and every other person or persons, to whom the same did, might, or should appertain, in part or in all."

Pearson v.
Lord, 6 Mass.
R. 81, and
Greave's
case.

§ 8. But it has been decided in the Supreme Court of the United States and in Massachusetts S. J. Court, that where these words are not in the policy, as is the case of many late forms in the United States, one in Vignier's situation not named in the policy, cannot maintain an action upon it, but in this new form the underwriter must know who he insures.

1 Esp. 27.—
1 Stra. 516,
Conner v.
Martyn.—
3 Wils. 5.

§ 9. If a note be made to the wife, the law vests the property solely in the husband, and he must sue it, and alone endorse it. See *Baron & Feme*. And her endorsement is void, *Dougl. 653*.

1 Bos. & Pul.
296, Farmer
v. Russell.—
Tenant v.
Elliot, 1
B. & P. 3.—
2 Burr. 1188,
Nickolson v.
Croft.

§ 10. If A recover money of B, to the use of C, C may recover it of A, though the consideration on which B paid A be *illegal*; for A shall not retain the money upon any pretence, he recovered it *illegally*; he cannot invalidate his own recovery. If a policy be signed by an *agent*, the assured may declare on one as signed by the *principal*; or on one as signed by the *agent* duly authorized; the last is the best way.

§ 11. The plt. cannot demand, in the same declaration, several satisfactions for the same thing ; but must, *pro formâ*, lay the thing demanded under an *alias* in each count after the first.

CH. 4.
Art. 1.

3 Ld. Raym.
841.

CHAPTER IV.

WHEN THE PLAINTIFF HAS A RIGHT OF ACTION AND OF WHAT KIND.

(General principles. The detail in subsequent chapters.)

ART. 1. § 1. Some writers have made a difference on moral principles, between a right of *action* and right of *compensation*. As if certain persons pull down my house to stop a fire, or to impede an enemy, or to effect some public good, and do this with sufficient cause, I can have no action against them. Yet, as my loss is to the benefit of others, I have a right to a compensation from them.

4 Home's
Sketches 22,
23, &c. &c.

§ 2. A right of action accrues, 1. When one unlawfully takes personal property from the owner ; 2. Unlawfully detains it from him ; or 3. Does an injury to it in his possession. So if one party violate his contract, a right of action accrues to the other. So a right of action accrues to one for an injury to his body, limbs, health, reputation, or connexions, or for an unlawful restraint of his personal liberty. And the kind of action depends on the nature of the case.

3 Bl. Com.
119, 120, 144,
166.

§ 3. In bringing actions there is one general settled rule ; that is, that the *kind* of action shall be brought, *which will decide the right*, and in which the *record will shew how it is decided* ; for it is the very intention of the law in prescribing an action to decide and settle the right ; and it must ever be material that the record shew how the right is decided.

Cowp. 414,
419, Lindon
v. Hooper.—
1 Esp. 97,
same case.

As if one receive my money, he is not legally entitled to keep, and the question of right cannot be completely tried in an action of *assumpsit* for money had and received, but may be in *replevin*, then *replevin* shall be brought. As when A takes my cattle *damage feasant*, and impounds them, and though I claim a right of common, I pay him money charged for the damage, I cannot have *assumpsit* to try the right. 1. Because on the *general issue* the deft. cannot be apprised of the point to which to apply his defence. 2. The right will not be decided ; for it will not afterwards appear on the *record*. But I must bring *trespass* or *replevin*, wherein the right will come in question, and appear on the record. The deft. ought to be apprised, and generally from the record, what points he is to prepare to defend ; and of course, what evidence he is

CH. 4. to produce. Of late years this rule has been too much dis-
Art. 1. regarded.

When an ac-
tion can be
commenced
on a bill pro-
tested,
for non-ac-
ceptance.
See Ch. 20, a.
11.
1 Cruise 260.

§ 4. The cases in which the plt. may have a right of action are almost infinite, and of which we can have no tolerable view, but by attending to actions in detail under their various heads, as in the following chapters.

§ 5. Wherever the law affords a remedy to establish a private right, or to redress a private wrong, it gives a right of action, except in a very few cases, in which the remedy is by the acts of the parties, or of the law. But no right of action can be transferred generally.

§ 6. The plt's. right of action will be best pursued in the usual divisions of actions, as in account, assumpsit, case, covenant, debt, &c. In each of which divisions the question will repeatedly occur, has the plt. a right of action or not? And when the plt's. counsel shall have decided, that he has a right of action, the question also repeatedly occurs, what kind of action is he entitled to? To answer these questions properly, it must always be material to understand precisely what his case is; whether his right of action is grounded on *contract* or *tort*, misfeasance or neglect; on a deed, judgment, or parol promise; on a title to lands, on damages to specific articles, &c.

Willes 131,
Eaton v.
Southby.

§ 7. Whether an action be *real* or *personal*, depends on the thing to be recovered by it, and not on the nature of the defence. If *damages* be to be recovered, the action is *personal*, though it involve title to land, as is the case in replevin. The damages depending on such a title do not at all change the nature of the action. So if the land be to be recovered, the action is *real*.

§ 8. In Massachusetts no case of a *mixed* action, in which both the *freehold* and damages are recovered at one and the same time, is recollected, except the case of dower in some instances, in which damages, for not seasonably assigning, are sometimes recovered in the same suit with the freehold or dower itself.

§ 9. There are various kinds of actions in the United States, respecting the salaries of gospel ministers and other subjects, and arising out of Federal and state statutes, and constitutions, and usages, which are not found in *English* law-books. So there are many kinds of actions in England, respecting titles and church concerns, and other matters not known in the United States, many of which will be occasionally noticed.

§ 10. Some, in considering the several kinds of actions, have divided them into *civil* and *criminal*; the former relating to *private* rights and wrongs, the latter to *public*. But suits that relate to *criminal* cases, to offences against the public,

and to the redressing of public wrongs are more properly called prosecutions than actions. Hence, the public officer who carries them on is appropriately called the *public prosecutor*.

CH. 4.

Art. 1.

§ 11. Various kinds of real actions, anciently resorted to, are now known only in black letter land.

§ 12. No action lies of any kind, where there is only *damnum absque injuriâ*, however frequent cases of this sort may be. Therefore, if I keep an *ancient school in a town*, and one sets up a new school near by mine, so as to draw away some of my scholars and profits, I sustain a damage, but without an injury, and can have no action.

1 Mod. 66, in
Yard v. Ford.

§ 13. But where my estate or interest supposes a grant, as of a *market*, I may claim an exclusive right there. One who erects a market so near mine as to lessen my business or profits, is liable to an action. When a loss is *damnum absque injuriâ*, or gives a right of action, is often a question of minute consideration. So if one have a ferry, time out of mind, by grant or statute, or in any legal form, in which he is obliged by law to keep it up, and another person erects a new ferry so as to take away a part of his *custom*, he has his action for such loss or injury. The principal reason of the distinction seems to be this: in the case of the ferry, the owner is obliged by law to keep it up, and attend to it whether profitable to him or not; consequently, the law protects him in the exclusive enjoyment of his estate and situation: but the master of the ancient school is not obliged to keep it up any longer than he finds it for his interest to do it; and therefore there is no particular reason for the law's securing to him any exclusive benefits; or for affording an action when he sustains a loss.

§ 14. In an action of *trespas vi et armis* innocence of intention is no excuse; but in an action on the *case* the whole turns upon it. Malice, or the *quo animo*, is the very gist of the action, said Lord Mansfield, in this case. Held, an officer is not liable to an action of false imprisonment for arresting a certificated bankrupt, a peer, a discharged insolvent, or a person who has taken advantage of a statute, which provides he shall not *be liable to be arrested*, and if arrested, shall be discharged, or a person privileged from arrests. If the officer arrest on a writ to arrest, he is excused detaining the privileged person a reasonable time to ascertain the privilege. On a general principle, the officer is excused if he act in obedience to the mandate of the court; even if erroneous, he is not liable in *trespass* for executing it. But if the officer act oppressively, with full notice of the privilege, *case* may lie; but it is otherwise with the party suing out the writ and delivering it to the officer, he must see it is right at his peril. Even as to

Doug. 671,
Tarlton v.
Fisher & al.
—See 2 Hen.
& Munf. 423
to 446. The
question of
case and *tres-*
pass well
examined.

Ch. 172, n.
9, 5.

CH. 4. this party the remedy depends on circumstances, whether
 Art. 15. trespass or case, malice or not.

§ 15. *Actions against several on one bill, &c.* As where the plt., the holder of a bill, brought four several actions at once, as one against the drawer, one against the first endorser, one against the second endorser, and one against the acceptor of the bill. Held, the court in such case stay the proceedings against any one, on his paying the bill and cost of the action, except against the acceptor who is the original defaulter, and against whom all the costs occasioned by the default may be recovered.

See Ch. 9 a.
19.

1 Caine's R.
47.

The plt. may sue on a covenant or have assumpsit, Weaver v. Bentley, the covenant having wholly failed on the part of the covenantor. 1 Dallas 428.—5 Johns. 85.—11 Johns. 527, Judson v. Wass.

§ 16. Held, the plt. could bring one action on a note against the maker, and one against the endorser, and recover in both actions, the debt in one, and the costs in both. This seems to be law generally, except in Massachusetts. See below.

§ 17. If A by bond acknowledges he has received B's money to buy certain goods named to B's use, B may aver A has not bought them, or paid the monies, in his action, and may sue the bond or have account.

§ 18. The plt. may *waive the tort* and sue on contract, as where the plt. takes goods in execution not the deft's., but A's, he may waive the *tort* and the trespass, and bring assumpsit for the money the goods sold for; for it is no prejudice to him who so took the goods, for A to waive the *tort*, for which he might recover damages in addition to the value of the goods. See Merrill v. Loring, next chapter, &c.

§ 19. Regularly every action must be brought against *individuals by their proper names*, or against a *corporation* truly named and described, on contracts, or for torts, or against persons made liable by particular statutes or judgments.

§ 20. *Formed actions.* In these the plt. cannot vary from the set form of words the law prescribes.

§ 21. *Conspiracy* is a formed action. And so is *trespass vi et armis*. Yet, however, special matter may be introduced into either, and in trespass judgment was reversed *nisi*, because the plt. used the words *pecias terra*, instead of *clausum terra*.

10 Mod. 140,
142, 159,
Skinner v.
Newton.

§ 22. Though the Romans had many formed actions enacted and established, yet they allowed several actions on the case, in *præscriptis verbis*; that is, each action adapted to the particular circumstances of the case.

§ 23. These are a few of the cases, in which the plt. has a right of action of this or that description. These chapters, 3, 4, 5, 6, 7, are intended merely to give a general view of the

nature and forms of actions. Actions can be seen at large and understood, only by attending to them, as considered and explained in a large part of the following chapters.

CH. 5.
Art. 1.



CHAPTER V.

WHEN THE PLAINTIFF HAS AN ELECTION IN ACTIONS, AND MAY IN SEVERAL CASES SUE EITHER.

(May waive the tort, &c.)

ART. 1. § 1. If the deft. *tortiously* take the plt's. goods, he may elect to bring *assumpsit* for the value of them or trover. So if one by deed acknowledge he has received £100 of B, to be adventured to the West Indies and thence to England, and covenants to account on his return, B may elect to have covenant or account. Mass. S. J. Court, July 1797, County of Lincoln. In this case Loring tortiously took away a barrel of flour from the plt., and he brought *assumpsit* as for goods sold and delivered, and recovered the reasonable value; and on argument the court held the plt. might waive, &c. So the plt. may elect *assumpsit*, when money has been extorted from him, and paid to get possession of his goods. 1 D. & E. 387, Ch. 9, a. 19, cases. 1 Bac. Abr. 19.—Rol. R. 52. Merrill v. Loring.—Lofft 320. 2 Stra. 915.—

If A, on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, his assignees may elect to disaffirm the contract, and bring trover to recover the value of the goods, or to affirm the contract, and bring *assumpsit* for the price. If the deft. convert the plt's. goods, he may waive the tort, and elect to bring *assumpsit* for money had and received, &c. 4 D. & E. 211, Smith & al. v. Hodson.—10 East 278, 295.

§ 2. If A take away my goods, and B takes them from A, I have my election to sue A or B. Salk 11; 1 Bac. Abr. 18, 29. Sid. 438.

§ 3. If I detain a ship ready for sea, the master has his election to bring *case* or *trespass*.

§ 4. If A receive my rents, I may view him as a *disseisor*, or waive the tort and have account against him. So if A slander my title, whereby B wrongfully disturbs me in my possession, I may sue A or B. 2 Wils. 644; Cro. Car. 308; Lit. sect. 588; 1 Bac. Abr. 29. 2 Dallas 178.—12 Mod. 16, 364.

§ 5. If A deliver his goods to B, to deliver them to C, and B do not deliver them, but converts them to his own use, A or C may sue B, and he who first commences his action shall exclude the other. 4 Bac. Abr. 9. 2 Esp. 65.—1 Bac. Abr. 32.

§ 6. If my cattle do damage in A's land, he has his elec- 2 Esp. 65.

CH. 5. tion to bring trespass or to distrain them. Election of account or *assumpsit*, ch. 8, a. 1, 9.

Art. 1.

2 D. & E.
166, Bennet
v. Allcock.

§ 7. So where the deft. tortiously entered the plt's. house, and debauched his daughter, above 21 years of age, but she was described as his menial servant. Held, the father had his election to bring *trespass* for breaking and entering his house, and getting his daughter with child, *per quod servitium amisit*, and consider the breaking the house as the principal part; or to bring case for the consequential damages, where the *per quod* &c. is the gist of the action. But if the trespass to the house had not been proved, an action on the case only would lie. See ch. 65, a. 1, s. 5, where the plt's. election confines him to one action. A gave a note to B, to pay him \$80 in good West India rum, sugar, or molasses, at his election, in eight days; he need not elect to give notice.

3 Day's cases
327, Ch. 7,
22.

4 Co. 95.
Case of Slade.

§ 8. Upon every contract *executory*, a man may have an action on the case or debt. So if one ousts the executors of his lessee for years of a term, they have their election to have an action on the case or *trespass*. And it is laid down as a rule, when there are two writs in the register for one and the same case, it is in the party's election to take either.

4 Bos. & P.
293, 296.—
9 Co. 87.—
Sty. 199.—
Cro. El. 557,
600.—5 Co.
82.

But the plt. has not an election to bring debt against an administrator, on a simple contract made by his intestate, but must bring *assumpsit*—was originally on account of the wager of law &c. And the court said so is the law, though the distinction between *debt* and *assumpsit*, as applicable to the case of executors, is not founded in good sense.

1 Com.
D. 149.—
4 Co. 94.—
2 Rol. 556.

So a man may sometimes have case or trespass at his election; as if any one take out of his possession wood cut down by him; or distrains for toll when it was not due; or goods not distrainable; or rescues a deft. taken at the plt's. suit upon a *capias*. See Election, &c. *Wheatly v. Stone*, Hob. 180.

Cro. J. 50.—
1 Com. D.
149, 150,
Tiffyn v.
Wingfield.—
Cro. Car.
325, *Slater v.*
Baker & al.—
2 Wils. 362.

Plt. may have *trover* or *trespass*; as where the deft's. bailiff seized the plt's. oxen for a heriot where nothing was due, and the deft. agreed and converted them. All the judges agreed that the plt. might have brought trespass against the deft.; and three judges held he had his election to bring *trover* or *trespass*; but two judges held the contrary; for, said they, by the taking, the property was out of the plt., so he could not maintain *trover*; but the three judges held a man may waive or lessen a tort, if he pleases, but cannot increase it.

1 Com. D.
Action M. 8.

So a man in some cases may have an action upon a statute, or at common law; as where it lies at common law, and then a statute is enacted giving a cumulative action on the statute, the party may elect to sue either.

1 Vent. 318,
332, *Dutton*
v. Pool.—
4 Bos. & P.
293, 297.

Debt for an annuity, or a distress; several cases, ch. 140. His election, who is to do the first act, ch. 154 a. 9, several cases.

A makes a promise to B for the benefit of his son or daughter ; B may elect to sue the promise himself, or to leave it and let his son or daughter sue C upon it.

CH. 5.
Art. 1.

§ 9. So if A covenant to do a thing under a penalty, the covenantee has his election to have *covenant* or *debt*.

§ 10. So where a man is accountable for money or goods, he may have an action on the case or account, at his election ; as where the deft. received goods of the plt. to carry beyond sea and dispose of them for the plt.

1 Salk 9,
Wilkin v.
Wilkin.

§ 11. So if goods be taken from one by wrong, he may have detinue, replevin, or trespass ; or he may have *trespass* or *trover* : for being taken by force, he may have *trespass vi et armis* ; or he may waive the force, and have detinue to recover the goods themselves ; or he may dispense demanding the goods themselves, and bring *trover* to recover the value of them in damages. He may bring replevin to have it decided if he shall hold the goods, and have damages for the taking, or return them to the deft. and pay damages for the damage done:—where the obligee in a bond has an election, ch. 144 a. 13, 17.

1 Com. D.
149,—Cro.
El. 824.

§ 12. *Where the plt. may sue on either of two events ;* as where the deft. made a contract to do an act on *the first of two events*, the plt. may enforce a performance, though he does not call for it until *both* have happened.

1 Ld. Raym.
183, Loggin
v. Orrery.

§ 13. *Action on a conditional promise.* A certificated bankrupt promised to pay a prior debt, *when he is able* ; the promisee cannot elect to sue this as an absolute promise, but must sue it as a conditional one, and *prove the deft's. ability* to pay. Contra, Ld. Loughborough.

2 H. Bl. 116,
Beckford v.
Saunders.

§ 14. Where A makes a promise to B for the benefit of a *third* person, there is an election ; B may sue it, or such *third* person may sue it. A subjects himself to the action of either. This however is not true in all cases. 1 Cranch 429, is a *quære*. But see 2 Lev. 210 ; 3 Bos. & P. 149.

1 Johns. R.
139, 149,
Schermern
horn v. Van-
derhayden.

§ 15. Where the plt. pays money to my servant and he misapplies it, the plt. has his election to sue him or me ; but it is otherwise if the servant has paid the monies over to me, the plt. may be entitled to, or for which he is entitled to a credit not given him.

Stra. 480, Ca-
ry v. Web-
ster.

§ 16. *Trover for a bill of exchange.* Held, that bankruptcy is no bar to *trover*, though the conversion be *before* the bankruptcy. Held, where the plt. has his *election* to bring *trover* or *assumpsit* for money had and received, he may have *trover* as above, though the bankruptcy is a bar to such *assumpsit* ; plt. may elect to waive the tort or not. The deft. dishonorably sold the plt's. bill at a discount, so received less than the amount, and this was all the plt. could have recovered, had he

6 D. & E.
695, 701, Par-
ker v. Norton.

- CH. 6. elected *assumpsit*, &c. ; and though he might elect to sue for
 Art. 1. less than his just demand, the law will not compel him to do it.



CHAPTER VI.

THE PLT. MUST WAIT TILL THE CAUSE OF ACTION IS ACCRUED, OR ACTIO NON ACCREVIT, CONSIDERED.

In Massachusetts the issuing the writ is the commencement of the action, Ch. 29, a. 7 ; so in New York.—18 Johns. R. 14. —8 Mod. 343, *Perry v. Kish*, and 2 Phil. Evid. 86. 2 Cro. 70, *Egles v. Vale*.—1 Com. D. 134.

Doug. 215, *Fisher v. Bristow*.—10 Johns. R. 119.

Doug. 55, *Milford v. Mayor*.—4 Johns. R. 144, 150, *Weldon & al. v. Buck & al.*—See Ch. 20, a. 9 ; Ch. 3, a. 11.—3 Wils. 17.—2 Stra. 949.—1 Wilson 59, *Box v. Day* and wife.

1 Sid. 307.

ART. 1. § 1. THE principle of law is well settled, that no action can be commenced till the right of action has arisen, and the plt. is become entitled to come into possession of the thing he demands. In the English practice it is said the plt. may sue out a *latitat*, before the cause of action accrued, but cannot declare till after, and there the reason given is, that the original process was only to bring the deft. into the marshal's custody, which might well be before the cause of action.

§ 2. If the plt. sue before the cause of action is accrued, it may be pleaded in abatement, and if it appear on the record, it may be moved in arrest of judgment, or be a ground of error.

§ 3. If a statute require the plt. to do an act, as to demand money of the deft. one month before he sues, and he does not, the deft. may plead the general issue, and defeat the action on evidence.

§ 4. An action for a malicious prosecution cannot be maintained till that is terminated ; and this matter must be stated in the declaration. If the declaration be of the preceding term, as August term, and the cause of action laid after, as September, it is bad on general demurrer.

§ 5. But if a bill of exchange be not accepted, an action will lie against the drawer before the time it is made payable, for the time of acceptance is to accommodate the acceptor, and it is not the intent to allow it to the drawer. 3 Johns. R. 202.

§ 6. So where the deft's. wife, while *sote*, gave a bond to the plt., conditioned not to marry any other person but the plt., and in case she did so, or refused to marry him in one month after her father's death, then to pay the plt. £200 ; living her father, she married Day the deft. ; the court held her bond was forfeited, and *suable*, though her father was living. But Lee C. J. doubted.

§ 7. A bond cannot be sued before the breach, and if it become due after the suit is commenced, and before the plea, yet the action is too soon ; for no action lies upon a contract

till there is a breach of it, and it is absurd to bring an action, that must, in its nature, suppose a breach before one exists. CH. 6. Art. 2.

§ 8. But if one demise land, and be not seised, an action lies against him before eviction; this was an action of covenant grounded on the word *demise* in a lease, which amounted to a covenant, the deft. was seised of the land, whereas in fact he was not seised, but a stranger was. And the Court held the "breach of the covenant was in that the deft., the lessor, had taken upon him to demise that which he could not, and that the word *demise* imports a power of letting, as the word *dedi* does a power of giving. Hob. 12, Holder v. Taylor.

§ 9. If A promise B to pay him 30s. rent a year, he cannot sue for 45s. for a year and a half, for it is payable annually. And if *entire* damages be given, it is void for the whole, for as to the last half year the right of action has not accrued. An *entire* verdict bad in part is bad for the whole. Lit. 61.

§ 10. Nor regularly can the surety sue his principal, till the debt is paid by the surety, or till there is judgment against the surety. See Post, Ch. 9 and 169.

§ 11. Nor can the assured maintain an action, on a policy of insurance, engaging to pay three months after proof of a loss, till the three months have expired.

§ 12. Nor can an assignee sue and recover on a covenant for a breach *before* the assignment; for he has no cause of action till a breach is made *after* the assignment.

§ 13. If the deft. allege a matter, which shews the action brought before the cause of action accrued, which is not relied upon, but the plt. pleads over, and issue is joined on a collateral point, it will not be error. As where it only appeared by the deft's. allegation, that Agnes had been dead two years, in two years after whose death the debt was to be paid, and this he did not rely upon, but plead over to issue. Cro. El. 110.

§ 14. In May 1803, the deft. agreed to remove his goods from a store, but neglected it; whence in 1806 the plt. was obliged to pay damages to A, to whom he had sold the store. Held, the cause of action accrued when the deft. so neglected in 1803, and not when the plt. was obliged to pay charges in 1806, and after 1803 was a demand that could be set-off. 3 Johns. R. 137, 138, M'Karras v. Gardner.

§ 15. The deft. promised the plt. to pay him in certain specific articles. Held, this was a *conditional* promise, and the plt. could not support his action without shewing, he offered to receive the said articles. But if A lend money to B, and B gives a *forged* security, A may sue immediately for money had and received. 8 Johns. R. 407, Bush v. Bernard. 15 Mass. R. 75, 81.

ART. 2. *The principle of survivorship in actions &c.* § 1. If 2 Esp. 91. there be two or more plts. or defts., and one or more of them die, if the cause of such action shall survive to the surviving plts. or

CH. 6.
Art. 2.

Co. Lit. 181,
183.
Salk. 206.

plt., or against the surviving defts. or deft., the writ or action shall not be thereby abated, but such death being suggested on the record, the action shall proceed at the suit of the surviving plts. or plt., or against the surviving defts. or deft. Survivorship, as it respects the rights of property or the rights of actions or remedies, is altogether a matter of *contract*. The estate survives, or goes to the survivor, only among joint tenants. And a joint estate only arises by the act of the parties. But to encourage commerce and husbandry, a *stock on a farm*, or a *stock used in a joint undertaking in trade*, though occupied jointly, is an interest in common, and the share of one dying, goes to *his representatives* and not to the *survivor*. But *joint interests* in chattels, goods or debts, covenants and contracts go to the *survivor*. When a joint estate survives, the survivor does not claim from his deceased companion, but under the original grant or devise, which created a *joint interest*.

§ 2. The remedy on joint contracts survives even among merchants; for if a note be given to two partners in trade, and one dies, the other, as survivor, alone must sue for and recover the debt; but it is only the remedy that survives, not the interest.

Mass. S. J.
Court, Essex
Nov. 1800,
Foster v.
Hooper, jr.—
3 Bac. Abr.
697.—2 Ver-
non 99.—
3 Wills. 72 to
118, Thomas
v. Thompson.
—2 Hen. &
M. 124.—
Mass. Act of
Feb. 26,
1800, At-
well, admr.
v. Milton.—
4 Hen. & M.
253, 256.

§ 3. Three men gave a joint note, one died, and it was adjudged that the action lay only against the *survivors*, and not against the administrator of the one deceased. The facts were stated in the declaration and demurrer thereto. And the *survivors* or *survivor* only are liable in *equity*, as well as in law. A *personal* action once suspended by the voluntary act of him entitled to it is gone forever. 5 Johns. R. 68.—2 Johns. R. 471, 477. See Ch. 29, a. 4, 3, 5, and 5, 2, where this matter is explained.

§ 4. By this act the goods and estate of each deceased debtor on every joint contract, after made or implied, are liable for the payment of his debts thereon, the same as on a joint and several one, hereby the creditor may sue the administrator of the one deceased or the *survivor*. So was, and now, by statute, so is the law in Virginia.

2 Johns. R.
213, 221,
Tom v. Good-
rich & al.
A like princi-
ple 4 Johns.
R. 461, 469.
Sluby v.
Champlin.

§ 5. If a partnership be liable, as for duties on the goods imported, and the government &c. take a bond for them from one of the partners, he only is liable to an action. The government had its election to hold them all liable, as the importers of their common property, to take security for the duties from all of them; but when the government made its election, and took security for them *by deed* from one of them, this became the only security the government was entitled to, and by its own act, and of course the others ceased to be

chargeable. One of five partners gave the bond, and held also his surety had a remedy only against him.

§ 6. *Assumpsit* lies by a surviving partner against the administrator of the deceased one, for property he withdrew from the joint stock, he dying insolvent, and the partnership concerns being unsettled; action being on a promise to account implied.

§ 7. The suing out the writ is the commencement of the action, to which the cause of action must be prior. The cause of action must be complete, when the plt. sues out his writ.

CH. 7.
Art. 1.

15 Mass. R.
116, 125,
Wilby v.
Phinney
admr. of Har-
rison.—
1 Caines 69.
—2 Johns. R.
342.—See
Ch. 20, a. 7, 8.

CHAPTER VII

ACTIO PERSONALIS MORITUR CUM PERSONA: ACTIONS ON CONTRACTS SURVIVE, ON TORTS DIE WITH THE PARTIES &c.

ART. 1. § 1. Wherever the testator could be sued on a contract, his executor may be. Cro. Jam. 405.

§ 2. *Trover* does not lie against an executor for a conversion by the testator. Plea, the testator was not guilty: judgment arrested. In this case Lord Mansfield and the court laid down this rule. 1. Where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by work and labour, or property of another, or a promise to the testator, expressed or implied, the action survives; but where the cause of action is a *tort*, or arises *ex delicto*, supposed to be *by force, against the peace*, there the action dies, as battery, false imprisonment, trespass, words, nuisances, obstructing lights, diverting a water-course, escape against the sheriff, &c. These as to the cause of action, or any injury to the person of the deceased or his freehold.

§ 3. 2. As to those which survive or die in respect to the form of the action. No action in which the declaration must be in form, *quasi vi et armis, et contra pacem*, or where the plea must be, that the testator *was not guilty*, can lie against the executor. The action is *ex delicto*, and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender. An action on the custom against a carrier is for a *tort*; the plea is, *not guilty*, and so lies not against the executor; but *assumpsit*, which is another action for the same cause, will lie. So if a man take a horse from another, and bring him back again, trespass will not lie against his executor, though it would against him; but an action for the use and hire

2 Bac. Abr.
444, 445.—
1 Salk. 314.—
2 Ld. Raym.
971.—1 Ld.
Raym. 40.—
Cowp. 372,
Hambly v.
Trott, admr.
Collins v.
Tennett,
Palm.
330.—Stra.
60.—Toller's
L. of Ex. 460,
461.—Off. Ex.
127.
The tort of
enticing an
apprentice
may be waived.
2 Maule &
Sel. R. 191,
202, Foster
v. Stewart.
Cites Bailey
v. Birtles &
al. ex.—Th.
Raym. 71.—
Toller 461.—
See several
cases,
1 Johns. R.
396, 405, and
principle ex-
amined.

CH. 7.
Art. 1.



of the horse will lie against the *executor*. The plt. alleged he was possessed of a *cow*, which he *delivered* to the testator to keep for the plt's. use, which the testator *sold*, and *converted the money to his own use*, and neither he nor the executor had paid. Held, the *executor* was liable; but obliged on this state of facts to plead, the *testator was not guilty*. The jury found him guilty. Judgment arrested, for it is a *tort*.

2 T. R. 549,
Atterson v.
Vernon.—
Toller 462.—
Cowp. 376.—
3 Mass. R.
228, Barnard
v. Harrington.—3 Mass.
R. 321, Petts
v. Hale. See
Ch. 171, a
13, 15.—
9 Co. 87, 91,
Fentor's case.
—1 Saund.
216, 219,
Wheatly v.
Lana.—Noy's
Maxims 14.—
6 Mod. 126,
and Co. L.
53, 54.

§ 4. In this case Lord Kenyon said, if one cut my trees and die, I cannot have trespass against his *executor*, for the tort dies with him; but I may sue for the value of the trees, and recover it out of his assets, so waive the tort.

§ 5. In *trover* the action dies with the deft., and his executor is not compellable to come and defend. So battery, Noy's Maxims 14.

§ 6. But the executor of the plt. in *replevin*, who dies pending the suit, shall be admitted to prosecute; or may be summoned &c.

§ 7. The law in this respect has been much altered since Coke's time. Then it had been long doubted if *assumpsit* being called *trespass on the case*, lie against executors, but in Fentor's case it was resolved on much consideration, that on the *assumpsit* of the testator an action lay against his executor. 1. Because the testator could not *wage his law*. 2. Because the debt remained due. 3. More just it should be paid, than that his executor should convert his goods to his own use &c. It was further resolved, that the plt. need not aver *assets* in the deft's. hands. Waste dies with either party; dies with the wife if her husband commit it. *Secus* of a term.

§ 8. The executor of J. S. sued the sheriff, for that the testator sued out a *scire facias* against A, whereon the sheriff levied the whole debt, and returned he had levied so much, only part; on motion in arrest of judgment it was said, this was a *personal tort*. The court resolved there was a difference between *mesne process* and the case of an *execution*; for by levying the goods a right was vested in the testator; but on *mesne process* it is a tort that dies with the testator.

§ 9. If tenant in dower have judgment to have the value of the damages, costs, and *mesne profits* and waste, and die before the damages be ascertained by writ of inquiry, her administrator cannot have a *scire facias*; for if the damages had been ascertained, they had vested in *her as a debt*, and her administrator should have them. But she dying before final judgment, and when the damages were due to her only by way of a *satisfaction for an injury*, which is in nature of a *trespass*, and the writ of inquiry being in the nature of a *personal action* for them, it died with her.

Salk. 12, Wil-
liams v. Ca-
rey.—3 Salk.
149, the same
case.—See
post, False
Return.

Salk. 252,
253, 295,
Mordant v.
Thorold.—
1 Ld. Raym.
646.

§ 10. In this case an *administrator* brought *trover* on the *testator's possession*, and judgment for the plt., and there was no objection that the action died with the intestate. So trespass for burning the intestate's mills. 1 Day's Ca. in E. 180.

CH. 7.
Art. 1.

§ 11. A obtained judgment against B as *executor*, A died, and his *executor* brought debt on this judgment against B, suggesting a *devastavit* in A's life time, and had judgment by *nil dicit* in 6 B. Now error being brought, it was objected the plt. was not privy to the judgment, and should have first brought *scire facias*; but the court held the action lay for A's *executor*, the wrong being done to A, though not against an *executor of a wrong-doer*; and that the executor may as well maintain this action, as debt for an *escape* where the testator might; that the tort was to the property of the testator—and the next case.

Salk. 285,
Blainfield v.
March.—
Salk. 314,
Berwick v.
Andrews.

§ 12. By 4 Ed. 3, and 31 Ed. 3, an executor or administrator may have *trespass* or *trover*, for the goods of the deceased taken in his life time; so for trespass; so for trespass with cattle in his close; so trespass to his grass. At common law these actions died with the party; and so is the case still of all actions for injuries to the *person* of the deceased, as assaults or batteries &c. And these actions were given for the recovery of the value of the goods.

Cro. El. 377,
Rutland v.
Rutland.—
1 Com. D.
332.—1 Vent.
187.—Jones
174.—
1 Day's cases
180.—Off.
Ex. 67, 68.

§ 13. On a view of all the cases on this head the distinction seems to be this: if *unascertained damages* belong to one for an *injury*, they die with him, or with the other party; but otherwise if ascertained by judgment, and a right has accrued to them as to property, or if damages be due on any *contract*, or *assumpsit expressed or implied*, the right to them survives.

Saville 40,
Perkinson v.
Gifford.—
Cro. Car.
539.

§ 14. Case against a sheriff, for his *deputy's default* in not returning an execution, survives to the judgment creditor's administrator.

7 Mass. R.
317, Paine v.
Almer.

§ 15. Under the 4 Ed. 3, c. 7, the executor of the testator may have an action for any injury to his personal estate, including his leasehold premises, or for cutting growing corn on his freehold lands, and carrying it away at the same time, but not trees, grass, &c. And at common law the executor has replevin for goods distrained in the testator's life time; or detainue for a specific chattel; or ejectment for a term for years; for in these cases *the thing itself* is the object of the action, and the property continues in the plt. But on 4 Ed. the executor or administrator in fact sues for the property only, and not for any injury to the person of the deceased, nor where he must declare *vi et armis* or *contra pacem*. And if he have his debtor in execution, and the officer let him escape, and after the creditor dies, his executor has escape, as the suit

Toller's L. of
Ex. 433, 434.
—1 Ventr.
187.—Litch
168.—Off.
Ex. 65.—
1 Scho. &
Lefroy's R.
264, Adair v.
Shaw.—Comm.
D. Adm'r. B.
13.—Cro.
Car. 297.

CH. 7.

Art. 1.

Toller 460,
426.—Com.
D. Adm'r. B.
14, 15.

really is for property only. Dyer 322; Ld. Raym. 973. So as to a false return, 4 Mod. 404; 3 Bac. Abr. 98; so error to reverse the testator's attainder, Latch 167; so an action of deceit and *audita querelâ*, id. and Off. Ex. 71. If the deceased imprison one, or divert a water-course, or slander one, or incur a penalty on a penal statute, or commit a nuisance, and die; the action therefor dies with him, and no action lies against his executor or administrator. 3 Bl. Com. 302. If A convert B's goods, and die, B cannot have trover against A's executor. But if A sold them for money, B has *assumpsit* against A's executor for money had and received, (waiving the tort.) True distinction in Cowper 376, 377.

13 Mass. R.
454, 455,
Cravath v.
Plympton,
Adm'r. of
Goodenow.

§ 16. The plt. originally commenced this action on the case against the said Goodenow, late a deputy sheriff &c., for a non-feasance, in neglecting to levy an execution for the plt. on the body of his debtor. The intestate pleaded not guilty and died before trial. The next term his administrator moved the action be dismissed, on the ground it did not survive against him. The court supported not the action, and the true distinction seems to have been taken, namely: when one by a tortious act acquires another's property, an action lies against the wrong-doer's executor or administrator; but if by such act the wrong-doer had no gain, the action dies with him. See Hamblly v. Trott, administrator, s. 2 above, in which action it was decided that actions *ex delicto*, as trover, assault and battery, defamation, imprisonment, nuisance, trespass, and *escape against the sheriff*, die with the party. But when the wrong-doer, by his tortious act, acquires another's property, as by cutting his trees and converting them to his own use, or so converting his goods, an action of trespass or trover will not lie, but the law gives some action suited to the case, to recover the property tortiously obtained, or the value of it. *Assumpsit* is often this action.

2 Inst. 382.

Mass. Statute
of 1806, c. 99.
March 13,
1806.

§ 17. This statute has altered the common law, as to actions against the executors and administrators of the *sheriff*, making them liable to suits for the mal-feasance or non-feasance of the sheriff or his deputy; but does not make so liable the executors or administrators of the *deputy sheriff*.

1 Co. L. 302.
—1 Cruise
257.

§ 18. If the lessee for years be guilty of permissive or other waste, and dies, the cause of action dies with him, and no action lies against his executors or administrators, but for waste while they are in possession.

1 Caines R.
Bogert v.
Hildreth.—
Kirby's R.
401.—Gilbert
v. Marcy.—
2 Johns. Ca.

§ 19. *Actions transitory*. An action against a sheriff for an escape is so; but the deft. has the common privilege of changing the venue on the usual affidavit; so an action *qui tam* may be brought in the county where the plt. lives, though the offence

335, 338, Barnes v. Kenyon, Glen v. Hodges.

was committed in another county. See *Marshall v. Hosmer*, CH. 7. ch. 75, a. 8, s. 7; ch. 175, a. 6, s. 13, and other cases there; *Leonow v. Ellis*, ch. 105, a. 1, s. 35; *French v. Judkins*, ch. 75, a. 8, s. 16. Action for use and occupation is *transitory*, being founded on privity of contract, and not on privity of estate; debt on judgment, local; all actions for injuries to personal property and to personal rights are transitory; 9 Johns. R. 67, 70, sundry cases actions local and transitory, ch. 175, a. 6; see the words *local* and *transitory*, and *venue*, in the index. Trespass in taking a slave in Vermont from his master, tried in New York, 9 Johns. 67, plt. a citizen of New York.

§ 20. *How if I fraudulently bar one of his action, he has one against me.* A by mutual covenants became indebted to B and C jointly in a certain sum; B assigned his interest to D, after which A intending to defraud C, and knowing B was wholly insolvent, obtained his release of the covenant, and then pleaded it in bar of an action on the covenant and defeated it. Held, this was injury to C, for which he was entitled at law to recover against A, though no judgment on the release pleaded in bar.

4 Day's Ca.
Coleman v.
Wolcott.—
1 Dicken's
R. 215, Garth
v. Cotton.—
1 Vesey 664.

§ 21. *An attorney's liability for negligence &c.* If by it his client's debt be not recovered by the attorney, he may of course be liable, yet not for the loss of the evidence of it of course, and if sued may show his client has recovered his debt by another remedy, or that he has another remedy.

3 Day's cases
390, Hunt-
ingdon v.
Rumhill.

§ 22. *Per quod servitium amisit; the principles on which this action is grounded.* So long as a father remains liable to maintain his daughter under age, he has a right to reclaim her services, and the relation of master and servant will be presumed from this right: as where a daughter 19 years old, with her father's consent, lived with her uncle, and worked for him when she pleased, and he agreed to pay her for her work, but no agreement for continuing in his house any time; when there she was seduced and got with child, and soon after returned to her father's, who maintained her and paid the expense of her lying in; she had no intention to return to him had not this misfortune happened. Held, he had a right to recover in this action on the principles above stated; but as the loss of service is the sole ground of this action, the father, in every case, must show he is entitled to the service, and has lost it by the daughter's wrongful conduct. See cases, ch. 5, a. 7; ch. 59, a. 6, s. 9; ch. 85; ch. 173, a. 5. The daughter was a witness to prove the facts. In this case the father had made no contract hiring out his daughter, he retained the legal control he had over her services; hence the relation of master and servant remained, and her volition or intention not to return, could not affect his right. 5 East 45, 49, seems contra, for it does not appear

9 Johns. R.
387, Martin
v. Payne.

CH. 8. the father had lost his legal control over the services of his minor daughter, and the case seems to have turned on her intention not to return to her father's house. 10 Johns. R. 115, 117, *Nicholson v. Stryther*, a father cannot have trespass for seducing his daughter, or getting her with child, *per quod &c.*, where she is above the age of 21 years, unless she is actually in his service, so as to constitute the relation of master and servant. 2 Phil. Evid. 157; *Fores v. Wilson*, Peake's N. P. 55.

CHAPTER VIII.

ACCOUNT.

ART. 1. The action of account is founded on *contract* and *privity in law*, or by provision of the parties, and must be for things *uncertain*.

§ 1. As this action is founded on *contract*, on which *assumpsit* in most cases lies, it is not often necessary to bring this kind of action. But as the court, of its own authority, can appoint auditors to adjust the accounts between the parties, which in some cases may be long and intricate, and very perplexing to a jury, it may often be useful, especially where there is no court of chancery, to enforce the settlement of such accounts in this form of action, and in which too the parties in many cases can be examined on oath.

1 Selwyn N. P. 1, *Morcarty's case*, A. D. 1781.
Imp. M. P. 143, 147.—*Owen* 36.—*Lev.* 24.—*1 Dal.* 339.
1 Selw. N. P. 1.—*1 Salk* 9.—*Co. L.* 172.—*1 Bac.*
Abr. 19.—*Imp. M. P.* 148.—*3 Bl. Com.* 162, 163.—*Plow.* 14.—*2 Ld. Raym.* 1223.—*2 Salk* 568.

§ 2. As this action of *account* is founded on *contract*, all who make it must be joined in the action.

§ 3. In this action there must be *privity* between the parties; and the deft. must not be a person, who has any claim in the thing to be accounted for.

§ 4. At common law this action lay against one as *guardian in socage, bailiff, or receiver*, or by one in favor of *trade and commerce*, against another, wherein both were named *merchants*. By a *bailiff* is understood a servant who has charge of lands, goods, and chattels, to make the best benefit for the owner, and to have his reasonable charges and expenses deducted, and is accountable for the profits he reasonably might have made: and by a *receiver* is understood one who receives monies, and is to render an account of them; but he is allowed only such charges and expenses as are agreed upon by the parties: and the plt. must state by whose hands the deft. received the monies, that he may know in season the nature of the charge, and how to defend against it.

§ 5. Equity in general does not decree an account of mesne profits where the title is merely legal, or the plt. is out of possession, except the plt. be a minor, or kept out of his title by some trust, mistake, or fraud on the deft's. part; see ch. 515, 3 Atkins 130; and in such cases the court direct the account to be taken from the accruing of the title.

§ 6. *Indebitatus assumpsit* was supported on these principles against executors, for the mesne profits after recovery in ejectment, and account would also lie. So where the plt. has been prevented from recovery in ejectment, by a rule of a court of law, to stay proceedings until another action pending was decided, and by an injunction out of chancery obtained by the tenant, who finally failed at law and in equity, the court decreed an account against his executors of the mesne profits from the time the title accrued. *Pulteney v. Warren*.

§ 7. When a widow applies to chancery for her dower, it gives her an account from the time her title accrued; the mesne profits are viewed as her support, and not as vindictive damages.

§ 8. This action of account is the proper remedy for one partner against another; one cannot have *assumpsit* against the other, or his administrator, for the proceeds of a partnership adventure, except a balance be settled, and an express promise to pay it. 2 Cain. 293; 2 D. & E. 483; note in *Foster v. Allanson*, and ch. 55, a. 5, s. 15.

§ 9. An action of account lies in every case where one has received monies to the use of another, especially if received of a third person to be delivered over, and though *assumpsit* may lie also; and the plt. has his election where there is a promise to account. *Wetmore v. Woodridge*. It belongs exclusively to the auditors to decide on facts, and their report cannot be set aside for a mistake in point of *fact*, but otherwise for a mistake of the *law*; they ought to find nothing in arrear. 2 Day's Ca. 116, their *law* decisions may be reexamined.

§ 10. Personal estate is devised to a woman during her widowhood, remainder over to B, she marries, account lies against her and her husband to recover it in favor of B. See ch. 38, a. 13.

§ 11. The plt. in this action alleged that he and the deft., by agreement, built a ship in equal moities, and agreed to share the avails equally; that she made several voyages, with cargoes on freight, specifying some of them, and directed by the plt. and deft., and was at last sold at Cadiz, and that the deft. received more than his proportion of the ship, both of the voyages and the sale. Held, they were under this declar-

CH. 8.
Art. 1.

1 Atk. 524,
Norton v.
Fraker; Bol-
ton, Duke of,
v. Deane.
2 Dal. 176,
Haldane v.
Duche's
Ex'rs.
—3 Dal. 503.
—6 Ves. jun.
88, 90.—
2 Dal. 178.

2 Br. Ch. R.
620, Dormer
v. Fortescue.
—6 Ves. jun.
89.—1 Bin.
191, Ozeas v.
Johnson.—
4 Dall. 434.

Kirby's R.
163, 164,
Mumford v.
Avery.—
Kirby's R.
363, Spencet
v. Usher.—
2 Day's Ca.
116.

2 Day's
Ca. 28,
Griggs v.
Dodge.

3 Day's Ca.
377, Hale v.
Hale.—Chan-
cery has con-
current juris-
diction in all
matters of ac-
counts with
the courts of
law.—

3 Johns. R. 470, & 2 Caine's Ca. in E. 106.

CH. B.
Art. 2.



ation joint owners of the ship, and jointly interested in all her voyages, from the time she was built to the time of the sale, and that it was proper for the auditors to enquire into the earnings of the ship, and the losses incidental to the voyage, in order to adjust the account of the parties.

13 Ed. 1.
Statute of
Marlb. &c.

ART. 2. *Sundry cases.* § 1. This statute gave this action of account to executors. Statute of Marlb. enacted, "that when land holden in socage was in custody of the heir's relations, during his minority, when he came of age they should answer the issues by lawful account."

§ 2. By 31 Ed. 3, an account was given to administrators, and by the 4th of Anne actions of account may be brought against the executors and administrators of every guardian, bailiff, or receiver, and by one joint tenant, or tenant in common, his executors or administrators, against the other as bailiff *for receiving more than his just share or proportion*, and against their executors or administrators, by 13 E. 3 to the executors of a merchant, by 25 E. 3 to executors of executors.

Watson on
Partnership,
291.

Mass. act,
Feb. 17, 1786.
Act of Feb.
90, 1818, au-
thorizes the
S. J. Court
and C. P. to
appoint audi-
tors as the
case may re-
quire.—
Laws of
Maine, ch.
59, sect. 23,
24, 25,
pp. 213, 214.

§ 3. By this act it is enacted, that on a judgment rendered in the Common Pleas, that the *deft. account*, he may appeal from it, before auditors be appointed, and if he do not, and on his appeal from the second or final judgment on the auditor's report, he shall not be entitled to *try the issue, bailiff or not bailiff*, in the Supreme Judicial Court; but the first judgment that he accounts shall stand in full force, and he account accordingly; and if he do not enter and prosecute his appeal, on the first judgment, it may be confirmed, on complaint; and auditors may be appointed; and if he refuse to appear before them, or refuse or neglect to account, they may certify it, and thereon the court may cause damages to be *assessed by a jury*, and enter judgment, and for reasonable costs, and award execution accordingly.

11 Co. 38.—
Imp. M. P.
150.

§ 4. By the English law, error does not lie on the first judgment to account; nor by our law, and for an additional reason, by that an appeal lies upon it.

Imp. M. P.
147.—Owen
36.—1 Bac.
Abr. 17.—1
Com. D. 118.
12 Mod. 517.

§ 5. The plt. cannot have this action against a *minor* as bailiff or receiver, or where there is no *privity*, as where A delivers goods to B to *my use*, or to be delivered over to me, for want of *privity* between me and B, I cannot have this action against him: nor does it lie for me, who take for the goods or money, security on the delivery thereof; for when one does this, the receiver cannot be said to be possessed of the goods or money, to render an account of the profits, also, when a person takes such a special contract, he must sue upon it.

§ 6. But if a bailiff receive my money, and promise to pay it, I may have *assumpsit* against him; but this security is

intended to be such as will of itself support an action. Again, to support this action of account, the deft. must have not only a bare oversight, as a shepherd of sheep, a butler of plate, &c. but so far a property as to be able to change the same for the benefit of the bailor, or at least, to make advantage thereof in order to render an account for the same; nor does this action lie against a *disseisor*, or a *wrong-doer*, or an apprentice.

CH. 8.
Art. 2.

1 Co. 93.—
Imp. M. P.
148.

§ 7. Account lies against a *surviving bailiff*—as where the plt. intrusted to the deft. and his partner, since deceased, some chests of coral beads, one partner died, and this action was brought and supported against the *survivor*, stating the partnership trust and *survivorship* in the declaration as bailiffs of the plt. from — to —, &c.

3 Wils. 72,
118, Godfrey
v. Saunders.

§ 8. So this action lies against the agents of prize shares, by one entitled to a share; so against one as bailiff of five hogsheads of tobacco, sent to a foreign market to sell on the plt's. account, and for his profit; so against one as bailiff and receiver, for the issues of lands and monies; so against guardian, for the profits of land; so against a partner; so by one joint tenant of a house against another; so it lies for the profits of £10, though not for £10, for the profits are *uncertain*.

Amer. Prec.
93, 94.—
Mod. Ent. 52
Imp. M. P.
163.

§ 9. But this action does not lie for rent reserved on a lease, nor against a lessee of goods who wastes them; nor against a bailee of goods, who wastes them, or who refuses to deliver them; nor in fact for any *tort*, or *certain debt*, but only on contract and for uncertain damages.

Bro. Tit. Ac-
compt 35.

§ 10. But it lies against a parent of an infant who receives the profits of his lands; so against a stranger as guardian, who enters and receives profits of the minor's land. So it lies against one, who of his own head receives the profits of my land. In this case the tort must be waived.

1 Bac. Abr.
19.—F. N. B.
117.—1 Com.
D. 110.—Co.
L. 89.—Cro.
Car. 229.—

§ 11. The plt. stated that being about to go beyond sea, he delivered a box and goods to the deft., who promised to dispose of them for him, and to render him an account of them on the deft's. return. He pleaded in abatement he was the plt's. bailiff, and merchandised the said goods, and that he ought to bring *account*, and not *case*; but judgment was given for the plt., for the action being grounded on an express promise, *assumpsit* lies, as well as *account*, and the plt. has his election, and whenever one acts as bailiff, he promises to render an account.

Salk. 9.—
Wilkins v.
Wilkins.—
1 Bac. Abr.
19, 20.—
1 Com. D.
149.

§ 12. At common law, if one joint tenant sold the wood and kept the money, the other had no remedy: so as to the profits of the land, before the 4th and 5th of Ann.

Dr. and Stud.
64.—Sulli-
van, 170.

§ 13. In this case the declaration stated, that the deft. was *bailiff of the plt.* of one twelfth part of certain lands, &c. from

Willes 208,
211, Wheeler
v. Horne.

CH. 8. April 1, 1720, to October 1, 1734, and received the annual
 Art. 2. profits thereof for all that time, to render his reasonable account thereof to the plt. on demand; plea "he never was bailiff or receiver of the plt. for the premises mentioned in the declaration, to render an account thereof to the plt. in manner and form, as the plt. above declared," &c. and issue joined. On the trial it was proved the plt. and deft. were *tenants in common* of the premises, the plt. one twelfth and the deft. eleven twelfths; that the deft. lived on the premises and took the profits thereof, about £8 a year, and refused to account to the plt.; but the plt. did not prove she ever appointed the deft. her bailiff of her one twelfth part. The court held, "that an action of *account* would not lie *by one tenant in common against another* as his bailiff at common law, unless he were so *appointed particularly*;" "but it must be maintained, if at all, on the statute of the 4th and 5th of Ann, ch. 16," for *receiving more than his just share and proportion*; "that it is an action of a very different nature from an action of account against a bailiff at common law."

Co. L. 172. 1st. "Because a bailiff at common law is answerable not only for his *actual receipts*, but for what he might have made of the land, *without his wilful default*:" "But by the plain words of the statute, a *tenant in common* when *sued as bailiff*, is answerable only for so much, as he has *actually received more than his just share or proportion*."

2d. "Because the auditors in an action at common law, could not administer an oath, unless in one or two particular cases; but by the statute, the auditors *may examine the parties on oath*." "Now as the judgment must be general *quod computet*, how can the auditors tell in what manner he is to account, or whether they are to examine on oath or not, unless it appear on the record, in what capacity he is sued, and what sort of an action this is." The declaration since the act has always stated, that the plt. and deft. *are tenants in common*, and that *the deft. has received more than his share*; as a general statute it is not necessary to plead it, or to refer to it, but the plt. should have set forth so much, as to bring his case within the statute.

6 Mod. 94. in
 Jenkins & ux.
 v. Plombe.

§ 14. "If one enter into my land and take the profits, I may, if I chuse, charge him in account, as my bailiff, though there never was any privity between us till the action brought." A draws an order on C, to pay B money to A's use, B owes C, and on the note C discharges him thereof; A may have this action against B, for by this operation B has received A's money. Auditors are not as referees. Hence their report, when appointed by *consent of parties* in a suit in equity, is not in the nature of an award of arbitrators, but may be set aside

12 Mod. 609.

by the court, though neither fraud, corruption, nor gross misconduct in the auditors be proved, 6 Cranch 8, 29.

§ 15. *Partners.* Account lies by one partner against another, both being styled *merchants*. The deft. was charged as receiver of monies to the joint benefit of the company from three persons. The proof was a receipt from one of them, and this was held to be good evidence to prove the charge. When there is no chancery, the court said the law courts must be liberal; and a partner charged as a receiver is entitled to a reasonable allowance. This is not the law as to a common receiver. There is a special trust reposed in such a partner receiver, to negotiate and do business for the common concern, for which a reasonable allowance is understood.

§ 16. Whenever a *receiver*, as a church warden, &c. is put to trouble and expense necessarily, he is to be viewed as a bailiff, and allowed for his trouble and his reasonable expenses, this is fairly implied in the nature of the transactions.

§ 17. When the verdict finds the deft., the plt.'s. bailiff or receiver *generally*, he must account for the whole declaration; but if specially, as to such and such things only, he is to account only for those things.

§ 18. In an action of account against a *bailiff*, the plt. need not shew by whose hands he received the monies; as in an account against a *receiver* he must, "except he be a *merchant*, and bring an account against another trading with him with a joint stock to their common benefit; in which case, naming himself a *merchant*, he may have an action of account against the other, naming him a *merchant*, and charge him as receiver of the money of him the plt., from whatever cause or contracts coming to their common use, and the other shall account for what he might have received, and be allowed his expenses.

§ 19. If before the auditors the deft. plead any matter in discharge, and the plt. denies this, so that they are at issue, the auditors must certify this matter to the court, which will award a *scire facias* to try it. If the plt. be nonsuited after the first judgment, he may have a *scire facias* on it.

§ 20. If A, tenant in common, occupy all the land, and the other do not claim to be admitted, and A do not hinder, he is not liable to this action of account. This was not on the 4th of Anne 16.

ART. 3. *Cases in Massachusetts. Sundry declarations in this action in print.*

§ 1. In this case in June, 1798, L. M. died without ever having had issue, and of course her husband was not tenant by the *courtesy*; and her estate, being a certain messuage subject to sundry privileges, devised to the deft., descended to the deft., her sister of the whole blood, to J. S. one of the plt's.,

CH. 8.
Art. 3.

1 Dallas, 339,
340, James v.
Brown.

10 Mod. 22,
Bishop v Ea-
gle.—11 Mod.
187.

12 Mod. 420,
Hilliard's
case.

Co. L. 172.

Watson on
Partnership,
292.

12 Mass. R.
149, Sargent
v Parsons.

Essex S. J.
Court, April,
1807, Smith
& al. v.
Moody.

CH. 3.
Art. 3.



her brother of the half blood, and to A. B. another sister of the half blood ; she had been married to the other plt. J. B. but died in 1802, leaving him alive, as tenant by the *courtesy*, and also, children ; the deft. had been in possession, as the plts. supposed, of the whole without any agreement.

§ 2. The plts. J. S. and J. B. brought an action of account, and alleged that said S., and B. and his wife in her right, and the deft., from June 20, 1798, to May 14, 1802, when Mrs. B. died, held together and undivided, as *tenants in common*, a parcel of land in —, bounded —, with a house and other buildings thereon, with the appurtenances, except the use of a chamber, and so excepting several small parts and privileges held by the deft. in *severalty* ; and that she during all that time, had the care and management of the whole of the tenements aforesaid so held by them, *to receive and take the rents, issues, and profits thereof, and as the bailiff of the said S. and B. of what she received more than her just share and proportion thereof, to render a reasonable account thereof to them on demand* ; and alleged further, she *had received more than her just proportion &c.* and had rendered no account &c.

Second count the same, except therein B's wife was not mentioned.

Third count was for time after Mrs. B. died, to wit, from May 15, 1802, to June 12, 1804, otherwise in the same form as the 2d count. Plea, never bailiff.

This case is material as it respects the statute of the 4th and 5th of Anne, because it will be observed this action is grounded expressly upon it, and there was no doubt in the court or counsel, but that it had been adopted here.

The plts. failed in this action, because the evidence proved that J. M. occupied the premises, and not the deft. ; but that she was only a member of his family.

It will be observed, that in the first count two tenants in common, one in his own right and one in his wife's right, joined in this action for the time she lived ; that in the 2d count the husband sued, as to the same time, and did not notice his wife ; and in the 3d count a tenant in common, *in fee*, and a tenant by the *courtesy* in common joined ; and that the proportions claimed by the plts. were not stated. And the court inclined to think the declaration was good in these respects. It was objected that the heirs of L. M. were *partners, not tenants in common*, but this point was not decided.

In the first count B joined his wife in making his claim, in the second not, and by the authorities it appears either is right. For a *tort* to her land, he and she *must join* ; for here the cause of action will survive to her, as for a *trespass*, a *nuisance*, *stopping her lights or way*.

Imp. M. F.
51.—2 Mod.
670.—Doug.
330.—1 Wils.
224.—2 Esp.
90.

But the profits of her land are his during the marriage, and he may avow alone, though he must state his case truly, "that the rent was due to him and his wife." Cro. Jam. 442. Cn. 8.
Art. 4.

§ 2. September, 1810, said S. brought an action of account against said J. M., for the time he was tenant in common by deed of said Moody's third part, by her heirship, not of her privileges, to wit, from October 3, 1798, to August 1, 1801. In his first count he stated, the plt., deft., and divers persons unknown, held as tenants in common, the same messuage; also on said statute, and did not except in this count said privileges. Second count stated the plt. and deft., for the same time, held as tenants in common two undivided third parts of said premises; this also was on the statute. These counts were in fact waived, and the plt. filed a third on the statute, claiming an undivided third part, subject to said privileges as above. Pleas, never bailiff, and never bailiff within six years. Verdict and judgment for the plt. on the third count.

2 Esp. 40,
Wise v. Bil-
lenta.
Essex S. J.
Court, April,
1812, Smith v.
Marsh.

It was said, though not much urged, that if there be three or more tenants in common, and one occupies all, another alone cannot have account; for the law does not raise a promise in the occupier to account to such tenants in common; so as to give twenty actions, if there be twenty tenants in common. But the action was supported.

If three tenants in common, A, B, and C, A alone may have an action of account against B, as bailiff to the common benefit of A, B, and C, for it may be that A alone intrusted his part only to B; but 13 Ed. 2 is contra.

1 Com. D.
115.—F. N.
B. 118, 266.

§ 3. The plt., deft., and one Palam owned 38 tons of wine, the deft. alone held it. The plt. sued for his third part. This was objected in arrest of judgment; but the court held the action could be supported, for Palam might refuse to sue, and the plt. might solely commit his third part to the deft., and the objection was not taken in abatement.

2 Co. 410.—
Hachewell v.
Eastman.

ART. 4. Pleas in account and evidence. § 1. The general issue in this action is never bailiff or receiver, and whatever matter goes to shew the deft. never was accountable, ought to be so pleaded; for if true, the action never ought to be sent to auditors. Nonage is a good plea in bar. 49 Ed. 3. 10.

41 E. 3. 3. 9.
45 E. 3. 14.

§ 2. It is a good plea in bar of the action that the deft. was the plt.'s servant to drive his plough or keep his cattle, for then he never was accountable. So it is a good plea in bar, that the plt. has released to the deft. all actions. So an award on all matters between the parties; so that the plt. accepted the deft.'s bond for the same sum: this destroys the duty.

Roll. Abr.
121 to 123.—
1 Bac. Abr.
20, 21.
Cro. Car. 116.

§ 3. But it is no plea in bar to the action, that the deft. has made payment of the money which he has received to account with, or that he has made satisfaction for the same; for

Dyer, 22,
146.—6 Co.
Ferrer's case.
—4 Leon 51.
—Stile 363,
410.

CH. 9. these pleas, being matters that shew he was once accountable,
 Art. 1. are only to be made use of before auditors.



§ 4. Nothing that may be pleaded in bar to the action can be pleaded before auditors, for every matter ought to be pleaded in proper time.

1 Selwyn N.
 P. 2.

§ 5. If the deft. plead he was never receiver, he cannot give in evidence a bailment to deliver to another person, and that he has delivered accordingly. This evidence does not support the plea. Judgments so above.

CHAPTER IX.

ACTION OF ASSUMPSIT.

ART. 1. *On promises not under seal, expressed or implied ; the three settled grounds thereof.* See Ch. 187, a. 18, s. 72 to 78 ; Ch. 148, a. 7, s. 2.

§ 1. The plaintiff may have an action of *assumpsit* on any promise not sealed, expressly made by the defts., or implied in law.

§ 2. The courts of law in the United States, as well as in England, now admit three settled grounds of actions, by means of which, *equity* as well as justice is done in most cases. On the first, the plt. is allowed to state his case in his declaration, as it really exists, and to say an action has accrued to him to recover so and so of the deft. ; and the law adjudges to the plt. what in *justice and equity* he ought to have. On the second ground the plt. may state he has paid and expended so much money *to the deft's. use, and at his request*, whenever that is the legal and equitable operation of the payment or expenditure. And the law presumes the deft. impliedly promises, or assumes to reimburse the plt. whatever and whenever, in equity and good conscience, he ought to do it, having a regard to a good consideration before described. On the third ground the plt. may state the deft. has received so much money to the plt's. use, whenever that is the legal and equitable operation of the receipt of it ; and the law again will presume the deft. impliedly assumes to pay it to the plt., whenever in equity and good conscience he ought to do it, having regard to the consideration.

§ 2. These grounds, together with a proper treatment of fraud, have rendered courts of equity of much less use than formerly, except in the modes of proof, in applying to the

oaths and consciences of the parties; and in the modes of relief, in ordering agreements and contracts to be, in some cases, *specifically* executed. The difference between equity, as a matter of right, and law, is inconsiderable. Equity is the soul of all law, and all good law is made in reference to equity. "*Equity must follow and not lead the law*:" it must yield to the law. However desirable, however politically and even morally right it may be, to divide the estate of the intestate parent among his children, yet if the law gives it to one alone, equity can afford no relief. "A court of equity determines according to the spirit of the rule, so does a court of law;" "both, according to the true meaning of the legislature." Equity at most, is to temper and mitigate the rigour of the law; that is, to make the general rules of law enacted by men, to conform in certain special cases to the law of reason, an exception impliedly understood in each general rule of *positive* law. It follows the intent rather than the words of the law. It corrects the injustice of positive law, and supplies its defects where the collateral consequences of it were not intended.

§ 3. Frauds, accidents, and trusts, (except a few trusts) are cognisable in a court of law, as well as in equity. A court of equity is governed by established rules and precedents. "In fact, the courts of law and courts of equity ought to have exactly the same rules of property, of evidence, and of interpretation." The power of the law courts of late have been much extended to most matters in equity. Lord Mansfield said, "in construing agreements, I know no difference between a court of law and a court of equity. Each can only explain the true meaning of the parties, neither can make an agreement for them."

§ 4. A court of law allows any thing to be averred, even against a deed, by way of *fraud*; as that the consideration expressed in the deed, and therein said to be paid, in fact was not paid. So the law considers a gift or conveyance of land, made with an intent in the parties to it, to defraud a purchaser on good consideration, as void, as against him; and so as to creditors: so a fine levied by fraud is void in law. The marks of fraud are the same in law as in equity; equity cannot affect any matter the necessary, direct, and plain consequence of a principle of law.

§ 5. The law considers a deed as fraudulent, if made with an intent, in *both* parties to it, to defraud creditors, though there be a valuable consideration, and possession be changed; lies for monies paid on a compromise, and no consideration.

§ 6. Fraud and covin, in judgment of law, may avoid every kind of act. So the law deems the fraud of the *agent*, the fraud

CH. 9.
Art. 1.

3 Bl. Com.
429, 438.—
Doug. 22.—
2 Com. D.
480 to 483.—
Dr. & Stud.
45, 57, 58, 59,
60, 61, 62.

Doug. 277.

Law Gr. 113,
115.

3 Bl. Com.
441.—3 Co.
77, Farmer's
case.
Swift.

Cowper 433,
Cadogan v.
Kennett.—
4 D. & E.
432.—3 Mor.
R. 63.—
1 Burr. 396.—
4 T. R. 39.—
1 Wood's
Con. 417,
418.

CH. 9. of the *principal* : also the law deems it a fraud if A buy land,
 Art. 1. having notice that B has a deed of it, not recorded.

§ 7. The actions of *assumpsit* are numerous ; they rest on one general principle, which applies to a multitude of cases.

2 W. Bl. 1269,
 Fenner v.
 Meares.

§ 8. Oftentimes the reason and nature of an action is best expressed, by taking a few of the operative words in the declaration. In these the essence of the action is usually seen. It is briefly done, and the repetition of forms is avoided. The obligor on a respondentia bond, engaged by endorsement on it to pay it to any assignee. Any assignee may have this action.

13 Mass. R.
 284, Rider v.
 Robbins, in
 error.

§ 9. A very usual kind of declaration in *assumpsit* in Massachusetts has existed time out of mind ; and the cases in which this form of declaring has been used, have been extremely numerous, but rarely ever called in question. It is short, simple, and plain ; and exactly suited to a great variety of cases, by means of an account annexed to the writ and declaration, in the form of a common ledger-book account in words and figures. In this form the deft. is sued to answer to the plt. in a plea of the case, [more formally, in a plea of trespass on the case,] “ for that the said D (deft.) at — on — being indebted to the plt. in the sum of — according to the annexed account, then and there in consideration thereof, promised the plt. to pay him that sum on demand ; yet, though requested, the said D has never paid them, but neglects and refuses so to do.” This account annexed may contain matters, usually charged on book, however many—and counts may be added in *quantum meruit* and *quantum valebant*, with like reference to the same annexed accounts ; and if the said request and refusal be expressed in the first count, and omitted in the after ones, the declaration will be good, because such averment in the first count may be applied to them. In such an action, in substance, in this case there was such a declaration, and on error brought, the first error assigned was, that by the first count there was no sufficient cause of action set forth ; and that in the second, the plt. had alleged no breach of the promise therein declared on. Judgment affirmed. First error was assigned, on the ground the account or schedule annexed constituted no part of the declaration. As to the second, Lawes’ Pleading in *Assumpsit*, 258, was relied on. For the deft. in error were cited Chitty on Pleading 324, 327, 318.—Ld. Ray. 284.—5 East 270.—1 Wils. 33.—1 Saund. 228. As to the first, the court decided the declaration was good on immemorial practice. As to the second, the court said, the authorities shew clearly, that one averment of request and refusal to pay is sufficient for any number of counts in *assumpsit* ; bringing the action too, is a request in law, 1 Wils. 33. See Stennett v. Hogg, Ch. 184, a. 5. 2. 5. However, there are some dic-

turns in the books, on the ground each count must be complete in itself; and no doubt this rule holds, when each count contains substantive independent matter in fact. CH. 9.
Art. 1.

§ 10. Another important rule in suing on contracts &c. A man is bound to sue, or take his remedy, on his highest security; and things of a *higher*, determine things of a *lower* nature, as a matter in writing determines an agreement in words; this further proves where the plt. has a written contract he must sue upon it. On the above ground, if one have liberties by prescription, and afterwards takes a grant by patent, this determines the prescription; for matter in writing determines matter in *pais*. If one has an *assumpsit* and a *deed*, he must sue on his deed. See Ch. 31, s. 10. So *majus continet minus*; the higher contract, in substance, absorbs the lower, the greater the less. But if a man offer to do more than his contract requires, his act is good for what it requires. As if he tender more than he owes, his tender is valid for what he owes. Noy's Max.
16, Connect.
Ed. 1808.—
Dy. 50.

Noy's Max.
16, cites
Finch 22.—
2 Stra. 1027.
—Co. L. 116.
—5 Co. 41.

Noy's Max.
16, cites 6
Co. 11.

§ 11. In bringing actions there is another rule, somewhat of the same kind. If a matter be within two jurisdictions, the plt. must sue in the highest, as if within a *franchise* and the *common law*, the latter has cognisance. Co. Lit. 126.
—11 Co. 48.

§ 12. A receives monies of B to account, he cannot have *indebitatus assumpsit*, unless A expressly promised to pay a particular sum. 3 Day's Ca.
506, Collins
v. Phelps.

§ 13. Where the deft. may retain monies *aquo et bono*, as were awarded to A, under the British treaty of 1794, for his vessel and cargo condemned, as prize, also for *expenses of B*, A's agent, in endeavouring to prevent a condemnation. A, for a valuable consideration assigned all his right in the award to C. Held, B could not recover the sum allowed for his expenses, from C, who was a *bonâ fide* purchaser of the whole. 4 Day's Ca.
42, Alsop v.
Magill & al.

§ 14. So this action lies, though the deft. gives a written promise to *account* on demand; as where B had a note against C, and A received it of B to collect or return it, and gave B such a promise, and received the money due on it. It seems by the decision in this case, that B could waive his *special promise*, and sue and recover for money had and received generally. 4 Day's Ca.
175, Pettibone v. Pot-
tione.

§ 15. Whenever A is liable to pay monies for B's benefit, and pays them, A has this action. 3 Day's Ca.
466.

§ 16. One may receive of me a bill &c., as a matter of *courtesy to use for my benefit*, yet be liable to my action if he promise to return it on demand, or pay the amount, and do not. 2 Johns.
cases 92,
Rutgers v.
Lucet.

§ 17. A mere agent, or attorney, who has no beneficial interest in a contract, cannot sue upon it in his own name. 10 Johns. R.
387.

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Art. 5.

2 Burr. 1012.

—1 Esp. 2, 4.

—Imp. M. P. 136.

And privity between plt. and deft.

seems not to be necessary.

See Ch. 20, a.

21, 19, 22, &c.

—See Ch. 9,

a. 18, 6, 9.—

5 D. & E. 603,

Smith v.

Jameson.

See Insurance, a. 24.

—2 Burr.

1010, Moses

v. Macferlan,

but see Kirby

127.—Imp.

M. P. 173.

2 W. Bl. Rep.

624,

Farmer v.

Arundell.—

Doug. 467.—

3 Maule & S.

344.—

B. 33, & Dr.

& Stud. 82

&c.

Salk. 28,

Hasser v.

Wallis, & Bull.

N. P. 133.—

1 Esp. 8.—11

Mod. 146.—

Imp. M. P.

172.

6 Taun. R.

143, 447. 816.

1 Esp. 8,

Shove v.

Webb.—

1 T. R. 732,

736, Shove v.

Webb.—6

Mod. 161,

Holmes v.

Hall.—

Imp. M. P.

177.—2 T. R.

360, Stratton

v. Rastob.—

4 Bos. & P.

34, 351,

Cooke v.

Munstone.

ART. 2. *For money had and received, when due in equity and good conscience.* This action, for money had and received,

lies wherever the deft. is bound in equity, and by the ties of natural justice, to refund the money ; but not when the plt. was bound in honour and honesty to pay it, though not in law, as if a debt be barred by the statute of *limitations*, or contracted by an infant, or fairly won at play, or the *legal* debt and interest on a *usurious* contract be paid, the same shall not be recovered back. So a breach of trust may be the ground of *assumpsit*.

ART. 3. *Monies paid by mistake.* § 1. As if an underwriter supposes a vessel is lost, and pays the loss, when in fact, she is not lost, he may recover back the monies paid. So if by *mistake* in settling an account, one pays too large a balance, he may in this action recover back the excess paid.

§ 2. So money paid by *mistake of the law or fact* may be recovered back in this form of action. There is some doubt, however, as to a mistake of the *law*, though the better opinion is, that money paid by mistake of the *law* may be recovered back, as will appear in several of the cases following, and ch. 75, a. 18, s. 8.—See 15 Mass. R. 207.

§ 3. In the law of France an error in *calculation* in a settlement must be corrected ; but otherwise, as to an error in *law*, though much is said as to *equity* and *conscience*, it is clear, “conscience must always be grounded on the law,” and so equity. Hence no room for either where the law is clear and certain.

ART. 4. *Monies obtained by deceit.* § 1. As where the deft. had a wife living, married another woman, and received her rents, she may have this action ; for she is deceived, and her pretended husband shall not avail himself of his own fraud. So if the deft. receives the premium on a *fraudulent* representation of a sea risk. So in any other case, where a man obtains monies by *fraud* or *deceit*, or by any imposition, monies paid knowing facts, but mistaking the law, not demandable, cannot be recovered back.

ART. 5. *When the consideration fails.* § 1. As title, &c. as if the plt. pay monies on an annuity, the title to which fails by an innocent mistake in registering the memorials, he may recover it by this action ; but not if he be guilty of any *fraud*, or it should seem *culpable negligence*, *quod maleficio non oritur actio*. But in the case of the annuity, it was held that though the surety joined in the receipt for the money, he was not liable to this action, when in fact he received no part of it ; for this being an equitable action, it is unjust and contrary to the principles of it, to hold one to pay money who never received it, and to estop him by a receipt, in which he joins for form sake only.

§ 2. So where the plt. paid monies to the deft., on his promise to make a lease of land to the plt., and before it was made, the deft. was evicted, the plt. recovered back the money he had paid.

So where the money is paid, and the thing contracted for is not delivered, this must be repaid, for the consideration of the payment fails. As where A paid monies to B to have certain shares transferred to him, and this was not done: but otherwise if the shares had been transferred, though to a less value; for then repaying the money would not be final and complete justice between the parties, and the plt. by accepting the transfer, waives his election to sue and recover back the consideration money—so by accepting any performance, or part performance, for one cannot confirm the act in part, and impeach it as to the rest.

§ 3 So if a sea risk be not run in any part, the insurer is held, in this form of action, to refund the premium, though not run even by the fault of the assured, if this fault be mere *negligence* and not fraud. And so for part where the risk is by settled usage divisible.

§ 4. So this action lies against an *auctioneer* for a deposit, if there be any *defect* in the thing *sold*; but the deposit is only recoverable with interest, not damages for the loss of the bargain. And it may be doubted if the deposit can be recovered back, if the buyer accept the thing *after* he has discovered the defect in it; for then, fairly understanding the case, he ratifies the contract of sale by his acceptance, and if he sustains any loss, he must be made whole in an action for damages, adequate to the defect in the thing.

§ 5. In this case the plt. sued for money paid by him to the deft. for land, and the question was, if the deft. could make a title to *real estate*. The deft., thinking he was tenant in fee, contracted to sell and convey the estate, and received £161, and on examination it was found he was not able to perform his contract; and judgment for him. It is to be observed that no exception was taken to the form of action.

§ 6. So if money be paid for a horse warranted *sound*, and he is *unsound*, and there is an *immediate return* of him, but otherwise the action must be on the *warranty*. "It is not *having the stipulated consideration*, and not its *want of value*, which the doctrine respects."

§ 7. *Title to lands in question* in this action; as where A devised two parcels of lands to B, C, D, and E, in trust to sell and divide the monies among his brothers' and sisters' children. E was one of twenty-four persons, entitled to the monies. The four trustees were proceeding to sell, when it was agreed by B, C, and D, and the other twenty-three legatees, that E

CH. 9.
Art. 5.

2 Esp. 3,
Briggs' case.
2 Esp. R. 522.
—Powell on
Contracts,
141, 142.—
Stra. 409.
Dutch v.
Warren.—
Cowp. 296.
Imp. M. P.
174.—
Bul. N. P.
31.—
1 D. & E. 184.
Towers v.
Barret.—
Dougl. 23,
Weston v.
Lowrey.—
Imp. M. P.
173.—
Show. 136,
Mortyn v.
Setwell.—2
Burr. 1240.—
Comber. 341.
—5 Burr.
2639, Bur-
rough v. Skin-
ner.—2 W. Bl.
1078.—1 H.
Bl. 19.—Imp.
M. P. 174.—
Holt's R. 35.
2 East. 37,
47, Watson v.
Faxon.
A receives
money of B
for a specific
purpose, and
fails to apply
it, this ac-
tion lies, 3
Day's Ca. 762,
Wales v.
Wetmore.—
3 Bos. & P.
161, Johnson
v. Johnson.
3 Bos. & P.
161.
Johnson v.
Johnson.

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should buy the two parcels and pay £300 for one, and £700 for the other. B, C, and D, with consent in writing of the twenty-three legatees, covenanted to convey a good title to E, but B and C only conveyed to him, and he took possession and paid both sums. The monies were divided among said legatees; E was evicted afterwards of the small parcel, because A, the testator, had no title to it. E sued the deft., one of the twenty-three legatees, or *cestui que trusts*, to recover back the share of the £300 he received, but though required by the deft., E refused to give up the £700 parcel, to be resold for the benefit of the concerned. Judgment for the plt. And the court held the two parcels were distinct, and the contract as to them, as two distinct contracts. Hence the plt's. retaining the £700 parcel was not adhering to the contract in part, and so an attempt to rescind in part. Held also the "plt. never had any title conveyed to him," as only two of the trustees executed the conveyance. But third, the court said, we do not mean to be understood to intimate, "that where under a contract of sale a vendor does legally convey all the title which is in him, and that title turns out to be defective, the purchaser can sue the vendor in an action for money had and received. Every purchaser may protect his purchase by proper covenants; where the vendor's title is actually conveyed to the purchaser, the rule *caveat emptor* applies." See also *Cripps v. Reade*, ch. 9. a. 14. Another case of title failing, and monies paid, 5 Taunton's Reports, 815. Assumpsit lies to recover the consideration money for land sold and conveyed, 14 Johns. R. 165; though the vendor in the deed says he has received it, for it is but a receipt, and parol evidence is admissible to prove it has not been paid, 14 Johns. R. 210, *Shepherd v. Little*. Land must be described, 13 Johns. R. 483.

3 Bos. & P.
181,
Elliot v. Ed-
wards.—
8 D. & E. 576,
Alpass v. Wat-
kins.

§ 8. B, by not paying his purchase money for a household estate, left his title incomplete, the sheriff on execution against him sold it to D, who paid down a deposit; this he recovered back by reason of defect of title, there had been no formal conveyance. See also *Howes v. Barker*.—2 Esp. R. 639, *Farr & al. v. Nightingale*.

Johns. R.
240, 750, Hall
v. Schultz.—
Plt. cited 2
Stra. 916.—
Dougl. 696.—
Deft. cited 9
East 469 &c.

§ 9. B's land was to be sold on execution, and A agreed by parol to buy it, and reconvey to B on payment of the sum advanced, and a reasonable allowance for its trouble. A bought it with his own money, and refused to reconvey unless B paid him \$300 in addition to principal and interest. This B paid, to get his land. Held, he could not recover back the money in this action. When he paid the \$300 to A, he was the owner and seller, and had a right to set his own price.

§ 10. Where, if the deft. accounts for goods to the owner, he is discharged of his promise to account for them to a third person. As where the plt. sent goods by one Kingsbury, to be sold by him in New Orleans, and there K. left them with the deft. to sell, who gave K a promise to account to him for them. Held, the deft. was liable to the plt. for the proceeds in an action for monies had and received; and his accounting with the plt. for them discharged him of his promise to Kingsbury.

CH. 9.
Art. 6.

12 Mass. R.
183, 185,
Chickering v.
Hosmer.

§ 11. *Failure of consideration, in equity.* The rule generally is, if an executory contract be, when made, founded on a good consideration, the failure of it occasioned by a subsequent contingent event, to which the agreement from its nature was subject, is not regarded in equity as a reason for not enforcing it. There are, however, cases decided otherwise; as 2 P. W. 217, where the plt. sold the deft. shares of no value, no decree to enforce, but enforced where the consideration failed in part; but other cases shew there is no difference between a failure of part and of the whole of the consideration; as 2 Vern. 421, and Pre. Ch. 102, 312; 2 Vent. 359; 1 Ath. 10; in both cases enforced on the general principle in equity. So 3 Bro. C. C. 605; so 1 Fonbl. 122 enforced, though the grantee of an annuity &c. died before the agreement was executed. So equity enforces the vendee to perform, though the property is burnt after the bargain made, and before conveyance, the chancellor saying, he by the contract has become in equity the complete owner of the house, was vendable as his, chargeable as his, devisable as his, his assets, and descendable to his heir; hence, at his risk, and he would be entitled to any profits arising &c., and if no time fixed for conveying it to him, it shall be conveyed in a reasonable time. Where assumpsit lies or not, to recover back passage money paid by passengers, the vessels, by distress of weather &c., failing to carry them to the places intended. 2 Bro. C. C. 118; 1 Madd. 532.

Newland on
Contracts,
82, 87,—see
1 Bro. C. C.
370.—
1 P. W. 602.
White v.
Nutt, enforced.
—Pow.
on Con. 61,
London v.
Richmond.—
4 Bro. C. C.
329.—
2 Vern. 280,
James v.
Owen.—
6 Vesey 349,
Paine v. Mil-
ler.—
New. on
Con. 246,
249.—
9 Johns. R.
210, 212.
1 Bro. C. C.
157.

ART. 6. *For monies paid on a void authority.* § 1. As where an agent of an administrator received a debt due to the intestate, and paid it to the administrator, and afterwards a will appearing, and the administration being vacated, the executor recovered this money of the agent. It may in this case be a question, if the executor should not have sued the administrator; especially if the money had been paid over to him before notice. In Allen, adm. v. Dundas, it was held, that payment of a debt to an executor on a *forged* will proved, is good, though afterwards the probate is declared void.

1 Salk. 27,
Jacob v. Al-
len.
1 Esp. 4.—But
see Allen v.
Dundas, 3 T.
R. 125.—
Imp. M. P.
179.

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Art. 7.

1 Ld. Raym.
742,
Newgate v.
Davey.—
Imp. M. P.
173.—
2 Show. 21.
—2 Mod.
260, 263.—
12 Mod. Rex
v. Elter.

§ 2. So monies paid by the order of a court, having no power, may be recovered back; as by the high commission court after the revolution; so if received under an order of sessions afterwards reversed; so if received by one, pretending to a title to fees &c. and who has no title to them; so where one pays a forged bill, note, or bond, for the authority is void. But in 3 T. R. 127, 129, &c. in *Allin v. Dundas*, the court and bar argued on the ground that a payment on a forged bill &c. was valid, because the payer ought to examine the contract; and see *Price v. Neal*, post.

§ 3. If an innocent person receive money on a forged note, not knowing the forgery, it is no crime in him, but he shall answer for the money only; but receiving money on a forged note, knowing the forgery is a publication of it; per Holt.

Cowp. 204,
Campbell v.
Hall.

§ 4. So where duties were paid on sugars, at Grenada, not by law payable, the plt. recovered them back from the collector; they had been left in his hands in order to try the king's right to them. In this action there was tried the validity of some of the most essential prerogatives of the crown.

2 Stra. 915,
Astley v.
Reynolds.—
1 Esp. 4, 6.—
Said to have
been overruled
by Ld.
Kenyon, see
4 Johns. R.
245.—1 Esp.
84.
4 T. R. 485,
487, *Irving v.*
Wilson & al.
—6 T. R.
406.—2 Pow.
on Con. 155
&c.

ART. 7. *Monies obtained by extortion, imposition, embezzling, &c.* § 1. As where the plt. pawned plate, and the pawnee demanded £10 as *usury*, which the plt. paid to get his goods back, and this he recovered; this was not paid by *mistake* or *deceit*, but by *compulsion*, a kind of force the law will not suffer one man to subject another to.

§ 2. If a custom-house officer seize goods as forfeited, not seizable, and take money of the owner to release them, which he pays, because demanded, and to get his goods, this he may recover back; it is paid by *coercion*, not as a *bribe*, or *voluntarily*. If it had been paid as a *bribe*, both parties had been in *pari delicto*; and if *voluntarily*, the rule "*non fit injuria volenti*," had applied.

§ 3. So where a creditor of a bankrupt demanded £40 for signing his certificate, and his sister paid it, she was allowed, in this form of action, to recover back the money, as having been oppressively extorted from her, though she had her election to pay it or not under all the circumstances of the case.

1 Esp. 5.—
Dougl. 696,
Smith v.
Bromley.—
2 T. R. 763,
766.—See 4
Johns. R.
245.
2 Burr. 924 to
930, *Smith v.*
Stotesbury.—
Cro. Jam.
103, *Bridge v.*
Cage.—Shr
Wm. Jones
165, *Badow*
v. Salter.—
Cro. El. 123,
Barkley v.
Kempton.

§ 4. So where the plt. Smith, the bailiff, arrested one Stanton on Redshaw's writ, and one Stotesbury promised Smith, if he would accept him and one Rippon, as bail for Stanton, he Stotesbury would pay Smith, the officer, six and a half guineas, when Stanton should pay fifteen guineas to Stotesbury; this was held to be oppressive, and that the officer could not recover it, and that if he had received the money he must have paid it back, for it is oppression in the officer to take money or a promise from the party or his friend, for doing

what it is the officer's duty to do, as to let to bail &c.; this was decided on a writ of error, Smith had recovered below. It is the sound and settled policy of the law, to hold all officers to do their duty for their legal rewards; and if they could be once allowed to make bargains for something more, and to recover, there would be no end to the extortions of some officers.

Ch. 9.

Art. 8.



§ 5. So where a nurse carried away the intestate's money at his death, it was held his administrator might recover it from her.

Bul. N. P. 130.—1 Esp. 6, Thomas v. Whipe. Cow. 806, 807, Stevenson v. Mortimer.—Salk. 382, East v. Plummer.

§ 6. So if a *custom-house officer* take exorbitant fees from the master of a vessel, the owner may recover back the excess in this action; for in *æquo et bono* it ought to be rescinded, and *qui facit per alium facit per se*. But an officer shall have his legal fees for serving an erroneous writ. The master must have been considered as paying in the course of his business, and so the owner's act.

ART. 8. For monies paid on judgments reversed, erroneous, void, &c. § 1. Monies levied on a conviction afterwards reversed, may be recovered back. Here the ground on which paid wholly fails.

Bul. N. P. 131.—Cowp. 419.

§ 2. So where the plt. had matter of discharge, but from the nature of the court could not there plead it, and therefore on judgment in the court paid it, this he recovered back in this action, in another court. See 1 Ld. Raym. 742.

2 Burr. 1006, to 1012, Moses v. Macfarlan.—

§ 3. If goods be sold on *scire facias*, and the judgment reversed, the goods shall not be restored to the debtor, but the value of the money for which they sold may be recovered; for if on the reversal the goods should be restored, there would be no buyers, and of course no execution. 2. The officer is compellable to levy the debt of the goods; the same of a term.

1 W. Bl. 219, 5 Co. 91, Hoe's case.—Cro. El. 278, in the case of Eyre v. Woodfine.—8 Co. 192.

4. In the case of *Goodyere v. Ince*, it was held, if the sheriff sell A's term on execution to a *stranger*, and judgment is reversed, A shall be restored only to the money, for the *stranger* has the term by *act of the law*; but if the officer deliver the term itself to the *creditor* on *elegit*, and the judgment is reversed, the debtor shall be restored to the term itself, and not have the money it sold for &c.; one reason may be when the officer sells by *order of law*, the buyer can have *no warranty*, but when the thing itself is set off to the plt. he may restore it, or if he sell it to a third person, the plt. may warrant it; but an officer cannot deliver goods to the creditor on execution, or is he to warrant them.

Cro. Jash. 216.—Cro. El. 604, Goodyere v. Ince.

§ 5. If the plt. pay money to the debt. on legal process, afterwards found not to have been due, the plt. cannot recover it back in this action for money had and received; the debtor's promise to pay the judgment is void, but a third person's is good.

See Ch. 75, a. 12.—7 T. R. 269, Marriot v. Hampton, and 1 Com. D. 176.—Cowp. 129.

CH. 9.

Art. 10.

Cowp. 197,
Clark v. Shee
& al.—1 Ld.
Raym. 742.
Dougl. 137,
Longchamp
v. Kenny.—
2 Mod. 263.

§ 6. The plt's. clerk *embezzled* his notes and money &c., and paid to the defts., for insuring lottery tickets against a statute. As these notes and monies were paid for an *illegal consideration*, and their *identity could be traced*, the plt. recovered in this action for money had and received, and though the clerk was *particeps criminis*, yet the plt. was not.

ART 9. *For the proceeds of one's property another gets by wrong and sells.* § 1. It is now settled law, that if one gets my property by wrong and sells it, I may recover the proceeds of him. I may waive the *tort* and sue for the property. As where A delivered to B a masquerade ticket to sell, and C took it from B, and B paid the value to A, the owner. Held, that B might sue C for the money he had received for it, and C not producing the ticket, the court will presume he had turned it into money; and same principle, 2 Ld. Raym. 1216, *Lamine v. Dorrill*.

6 T. R. 197,
Broadley &
al. v. Clarke.
—Imp. M. P.
173.

§ 2. So if a trader commits a secret act of bankruptcy, and then pays money to a carrier, the trader's assignees may recover it back. So this action lies against the stake-holder, by the winner on a wager, where that is not against law, as by winning he becomes legally entitled to the money. To this action for money had and received, the *condictio indebiti* of the civil law bears a strong resemblance.

6 T. R.
600.—1 Mass.
R. 76.—
1 Salk. 22.—
Cowp. 343.

ART. 10. *For monies paid on contracts illegal and void in law.* § 1. The general rule is that monies paid on such contracts may be recovered back, except in two cases. 1. Where the plt. is not entitled to the money in equity and good conscience. 2. Where the plt. is *particeps criminis*, and *in pari delicto*. In the case of a bribe, both are equally guilty; and 2 Caines' R. 147, *Belding v. Pitkin*.

4 T. R. 561,
Munt & al.
ex'rs. v.
Stokes & al.
—5 T. R. 406.

§ 2. In Jan. 1785, M'Intosh, at Calcutta, borrowed of the defts. British subjects, *at respondentia*, £2166, 13s. 4d. at 10 per cent., on a *contract void* by 7 Geo. 1 and 21 Geo. 3; December 21, 1485, he died and left the plts. his executors, who October 1786, on request paid the defts £2004 3s. 4d. in discharge of the bond; and finding they had paid monies on a *contract void by statute*, now sued to recover them back. Judgment for the defts. For as they *bonâ fide* lent the money, they ought in equity and good conscience to retain it. They received the monies, when paid, on a contract not *malum in se*, a crime against the law of nature, but *malum prohibitum*. If one sue to enforce an illegal contract, he must, 1st, *draw justice from a pure fountain*, and have clean hands; 2d, *potior est conditio possidentis*. Yet, however, it was held that the defts. could not have compelled payment of this bond.

4 Bl. Com.
7, 8.—Mar-
shall 557.—
See Ch. 11 a.
2, s. 8.

§ 3. The plt. paid £64 17s. 6d. premium to the deft., the office keeper, for insuring lottery tickets, and recovered of them that sum, the insurance being void by statute. Here Blackstone J. said the contract was not *criminal*, but merely *void*, as to the plt., for as it was said the act makes the insurance criminal only in the office keeper insuring, and not in the insured; and according to the case of *Browning v. Morris*, if the office keeper had paid the loss, he could not have recovered back the money. And 792, Ld. Mansfield said that the party paying *usury* may recover back the *excess of interest*; and so if a *bankrupt* pay money to get his certificate, he may recover it back, for though he is a party to the illegal act, yet he is not in *pari delicto*: in the first case the statute punishes only the lender on *usury*, and in the second the creditor of the bankrupt.

§ 4. Lord Mansfield in Dougl. 679, (cited,) made this distinction, "If the act be *in itself immoral*, or a violation of the general laws of public policy, then the party paying shall not have this action, for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subject against oppression, extortion, and deceit; if such laws are violated, and the deft. takes advantage of the plt's. situation, then the plt. shall recover.

§ 5. If A receive money to the use of B, on an illegal contract between B and C, A shall not be allowed to set up the illegality of the contract, as a defence against B; and *Farmer v. Russell*, 296.

§ 6. So if I get A to insure my ship, and she is not seaworthy, I may recover back the premium, when no fraud is imputable to me; for the policy never attaches, the risk never begins; and some cases go so far as to say I may recover back the premium, even though I knew she was not seaworthy when I received it. These cases go on the ground, that the underwriter never runs any risk in such a case, and so there is no consideration for his retaining the premium. But some doubt, and with some reason, if going so far does not afford very considerable temptations to practise fraud, because the assured has the temptation to throw the risk of a bad ship upon the underwriter, thinking he will not come to the knowledge she is not seaworthy, as the chance is always very considerable he will not, though in fact she be so.

ART. 11. *For monies mispaid to an agent, not paid over, &c.* § 1. One question arises in many of these cases, what is a paying over? It has been held that merely *passing* monies

177.—*Stra.* 480.—1 *Camp. N. P. R.* 396, *Townson v. Wilson*; for money over-received against parish officers.—4 *Bos. & P.* 206, *Taylor v. Hare*.

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2 W. Bl. 1073;
1075, *Jaques v. Golightly*.
Cowp. 197,
790.—1 H.

Bl. 65.—
Cowp. 790
to 793,

Browning v. Morris; the deft. agrees to pay the plt. his costs if he would not oppose the deft's discharge under the insolvent act, is illegal and void;
2 *Johns. R.* 286, *Waite v. Harper*.

Bland v. Robinson.

Tennant v. Elliot, 1 *Bos. & Pul.* 3.

Marshall 557.

Cow. 565,

Buller v. Harrison.—
1 *Com. D.*

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in *account &c.*, is not a paying over; as where the plt. paid on a policy to the deft., as agent for the insured £2100, thinking the loss fair, deft. on the payment passed it to the credit of his principals against £8000 they owed him; the plt. demanded the money as for a foul loss. There was no change of the agent's situation after notice of the loss: he had not accepted any fresh bills, nor advanced any new monies, nor given any new credit to his principals. Judgment for the plt. But held, that had the agent paid it over to the principals before called on, the action must have been against them. Where the agent acts fairly, it is very plain the action ought to be brought against the principal, especially when he holds the money.

4 T. R. 553,
Greenway v.
Hurd;
Whitebread
v. Brooks-
banks.—
Loft 529.
4 Burr. 1284,
Sadler v.
Evans.

§ 2. In July 1785, the plt. paid monies to Hurd, a collector of excise, on a statute which had been repealed, who, before the action was brought, had paid it over to the superior officer. Judgment for the deft., and the plt. must have recourse to the superior officer. See ch. 56, a. 3, s. 3.

§ 3. In this case the plt. paid *quit rents* to the deft., as the agent of Lady Windsor; the deft. had his receipt for the monies *received to the use of Lady Windsor*. Her right to the rents was denied by the plt., and he brought this action to *try their rights*. Judgment for the deft.; for the action should have been brought against Lady Windsor. As the money was paid to her *known* agent, whether he had paid it over or not, it was improper to try the right in an action against *him*, and when it was *known he acted for her*, and the court doubted as to the case of Jacob v. Allen. See 1 D. & E. 62.—1 Ld. Raym. 742.

4 Burr. 2133,
Dale v. Sal-
lett.

§ 4. If I recover monies for my principal, my services therein are a charge upon them, and may be deducted, and is not in the nature of a cross demand or mutual debt.

1 T. R. 235,
Bige v. Dick-
son & al.
assignees.—
9 Johns. R.
201, Ripley
v. Gelston.
Notice to the
agent not to
pay over to
his principal
money
wrongfully
demanded
and received,
is not neces-
sary, where
the payment
is by com-
pulsion, and
not made ex-
pressly to the
principal's use.

§ 5. The plt. was a broker or agent, with a commission *del credere*, that is, he was absolutely liable to his principal, in the first instance. The bankrupt underwrote policies largely for the plt. for his foreign correspondents, on which the losses were £661. These the plt. paid to his correspondents in consequence of his *del credere*. The bankrupt owed the plt. this £661, and charged him with the premiums. At the time of the bankruptcy the plt. owed the bankrupt £1356. This he paid to the assignees, *not knowing he was entitled* to hold the £661 *due to him as a set-off*. Afterwards finding his mistake, he sued for and recovered this £661, which he had a right to have retained &c. This case goes on the principle, that one ignorant of his right, may neglect to make his claim when he may do it, and yet afterwards assert it. And was not this ignorance of his *legal* right?

§ 6. The plts. in this case confided, though improperly, in the mistaken affirmation of the defts., and paid them money. The court held, the plts. might recover it back in this form of action. As where the deft's. teller told the plts., that the defts. received \$850 checks of the plts. of one Rawson's which were bad, and the plt's. teller giving credit to this assertion received them, and paid the defts. for them, when in fact the defts. received them of the Boston Bank.

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Art. 12.

3 Mass. R.
74, Union
Bank v.
United
States Bank.

§ 7. This was an action for money had and received. The deft. received monies awarded him under the British treaty of 1794, but in equity and justice it belonged to Geyer & Son, and their assignee recovered in this action. According to this case, if monies be justly due to A, and they be awarded to me, I hold them to his use, in trust for him, and his right to them may be enforced in a court of law in this form of action. In this the *cestui que trust* recovered against his trustee on parol evidence, proving he was such in fact, though it did not appear in the award.

4 Mass. R.
326, Heard,
assignee of
Geyer & Son
v. Bradford.

§ 8. A and B agreed to buy certain goods jointly; A took the whole to himself and sold a part, and applied the rest to his own use. Held, he was liable to B for his proportion of the profits of the purchase.

11 Mass. R.
321, Stiles v.
Campbell.

ART. 12. *Several cases money had and received.* § 1. In this case the plt. paid to the deft. £262 10s. For this sum he promised to transfer to the plt. five shares in the Welsh copper mines on a certain day named. On that day he refused to transfer, and the plt. sued him for the money, as being had and received to his use, and recovered £175, the value of the stock the day on which it should have been transferred. The court considered the action as brought not for the money, "but the damages in not transferring the stock at the time." Quære, if this action was correctly brought.

Stra. 406,
Dutch v.
Warren.—
Imp. M. P.
187.—1 D. &
E. 687.—
2 Bos. & P.
277.

§ 2. This action lies for a legacy, where the executor acknowledges it is ready to be paid; this must be on the ground, he has received the money to the legatee's use, though the best practice is to sue specially for the legacy. So it lies for monies paid to a customhouse officer to run goods, which were seised. But the plt. must not be *particeps criminis*; for then there is no reason he should have his money again, for he parts with it freely, and *volenti non fit injuria*, and also the rule *melior est conditio defendentis* applies. But the rule of *volenti* &c. does not apply, where the party has not his freedom of exercising his will, and though his restraint is only that of a borrower on usury &c.

Bul. N. P.
130 to 133,
Camden v.
Turner.—
Tompkins v.
Bennet,
1 Salk. 23,
Web v.
Bishop.

§ 3. But this action does not lie, where the deft. enters into articles to account, for the plt. has a higher remedy, a special action on the articles; a special contract too excludes an implied one.

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Art. 13.

4 T. R. 182 to 195, Hunter & al. assignees v. Potts.—1 H. Bl. 665, Sill v. Worswick.—1 East 6, Smith v. Buchanan.—Salk. 12.—Ld. Raym. 40.—4 Mod. 408, Williams & al. v. Carey.
2 W. Bl. 684, Nightingale v. Devisme.—1 Burr. 589.—1 East 1.—6 East 182.
Cowp. 793, Jestons v. Brooks.—1 Bos. & Pul. 306, Walker v. Constable.
1 Com. D. 176.

2 Burr. 1082, Robinson v. Bland.

5 T. R. 434, 435, Davidson v. Atkin.—808.

§ 4. Blanchard & Lewis in *England* became bankrupts, Potts, the debt., knowing it, attached a debt due to them from Russell, in *Rhode Island*, and recovered it. Their assignees, the plts., brought this action against Potts, and recovered, for when Blanchard & Lewis became bankrupts, the debt from Russell became due from him to their assignees, and then Potts recovered it to their use.

§ 5. If an officer levy money on an execution, the plt. may have this action; and if the officer die, this action lies against his executor. So if the plt. die, his executor may have it, though objected that it was a *personal tort*, that died with the plt.; for it is an injury to his *estate*, and within the equity of the statute of 4 Ed. 3, 13.

§ 6. But it has been decided, that stock in the funds cannot be demanded *as money* in this action; for where stock is to be demanded, it must be sued for, and the value of that, at the time it should have been transferred or delivered, is the measure of damages, and it may be a question, if the form of the action in *Dutch v. Warren* was correct.

§ 7. Nor can the plt. in this action recover an unreasonable demand, though not usurious, as half the profits of a sale over and above principal and interest. Only the net sum without interest can be recovered; for as the action is only for money had and received, it can be only for the money actually received to the plts. use. But as to monies obtained or detained by fraud, see *Interest*.

§ 8. This action lies for money lent at play; for by the statute of the 9 of Ann, the *security*, not the *contract*, is void. Had, therefore, the lender taken *security*, it would have been void, but the matter remaining in *contract*, that was not void. So was the decision in this case, and this nice distinction is visible, a *contract* made to me may be valid, and yet the *security* given to me may be void. A contract to pay me \$1000, this may be valid, but his security for it, as his mortgage of lands in fee merely in writing, and not by deed, may be void. But was not the statute passed to prevent gaming? And if such a distinction as above can prevail, the winner will only take a contract, and trust to that and recover, and thereby generally defeat the statute. It may be well doubted if the legislature thought of any such distinction.

ART. 13. *In this action the husband cannot recover monies secured to his wife's sole and separate use.* § 1. In this case one Stoddart devised lands to three trustees, in trust, to sell for the benefit of certain persons, one of whom was the debt's wife, and under it to receive the rents and profits, and to pay a certain part to her, *for her sole and separate use, exclusive of her husband's control*. The land was not sold, but the trus-

trees let the collieries &c. The deft's. wife, before her marriage, conveyed one eighth part of the profits to the plt's. wife, then married, *to her sole use, and exclusive of her husband's control.* The trustees received rents, and paid the deft's. wife her whole part, not knowing she had sold one eighth to the plt's. wife. Judgment was for the deft; for this one eighth belongs to the plt's. wife, her husband cannot sue for it; and the said trustees may be considered as her trustees. If he could recover this money, he would destroy her separate right.

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Art. 14.

§ 2. *This action does not lie for money paid on a note.* This was *assumpsit* for money had and received. Porter had a note against Rogers and sued it; and in this action Rogers attempted to prove payment on it, but failed to do it, and Porter recovered the whole note. Rogers then brought this action to recover the amount of the payments, and judgment was against him; for those payments were tried in the first action, and then was the time to try their validity; and that they could not be tried again, for a matter once tried in a *personal* action is final, and cannot again be tried, on an idea that new and subsequent evidence has been found, as was suggested in this case. In such case there can be no remedy, but in a review or a new trial in the usual course, or specially allowed by the court or the legislature.

Mass. S. J.
Court, June
Term 1799,
Rogers v.
Porter.

§ 3. The plt. paid monies to the deft. for a share in a cruise, proposed to be made by a privateer, which cruise was prevented by a peace made. Held, the plt. could not recover it back.

13 Mass. R.
216, Wood-
ward v. Cow-
ing.

ART. 14. *Where there is a warranty, this action for money had &c. does not lie.* Yet generally it does where plt. pays the deft. for a thing, and by his fault the plt. does not get it; because when there is a warranty, or special covenant, there is a remedy on a *special contract* to which the party must resort; as where this exists, the law does not, and need not raise an *implied* promise, or an *assumpsit in law*, the very ground of this action for money had and received. Nor does this action lie where the plt. ought to look to his title, nor where the contract is executed in part; for where executed in part, this action to recover back the consideration money, does not do final justice between the parties. See Ch. 122, a. 15, this subject further considered.

§ 2. *Carey Bartlett* possessed a leasehold estate, and died, and his widow took administration on it, calling him *Caleb Bartlett*; she died, and the deft., Read, claimed the estate as her administrator, and sold it to the plt. for £42, and delivered to the plt. the lease itself, but made no assignment of it, or any conveyance. The deft. said "the premises were his right

6 T. R. 606,
Cripps v.
Read.—
1 Com. D.
175, see
Johnson v.
Johnson,
3 Bos. & P.
161, 170.—
& Rawle 42.

Jones v. Ryde, 5 Taun. 488.—11 Johns. R. 527.—12 Johns. 436.—But. Serg.

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and property to do what he pleased with, and if any thing happened he would see the plt. righted." Afterwards, another person took a proper administration on *Carey Bartlett's* estate, and recovered it. Judgment was for the plt. for the monies paid; and Lord Kenyon said, the whole passed by *parol*; and both parties proceeded on a misapprehension, thinking the deft. was the legal representative of *Carey Bartlett*, the lessee, though it afterwards was found he was not, so the money was paid by mistake, for a thing he could not sell who received the money.

Doug. 654,
Bree v. Holbeck.

§ 3. In this case the court recognised the authority of *Bree v. Holbeck*, in Douglas, in which the deft., as administrator with the will annexed, assigned a *forged* mortgage to the plt., then not known to be forged, and covenanted that neither he or the testator had incumbered the premises. So he did not covenant for the goodness of the title. More than six years after, the plt., the assignee, discovered the forgery, and brought this action to recover back the £1200 he had paid for the assignment, and judgment against him; for there was no fraud on the deft's. part, and the court said, "it was incumbent on the plt. to look to the goodness of" his title; but see several other cases on this point.

Mass. S. J.
Court 1797,
at Portland,
Little v. Roberts.

§ 4. This was an action on a note of hand, the deft. gave the plt. for the consideration in the purchase of land, to which it was said the plt., the seller, had no title; but as the plt. had given his deed of the land *with warranty*, the court refused to go into the consideration of the note. On the same ground the deft. could not have sued for money had and received, to recover back money he paid for the lands; because he had taken a deed of them *with warranty*, and further the deft. had conveyed the lands to the plt., and given him possession.

Mass. S. J.
Court, Essex
county, Nov.
1792, *Crossman v. 2d
Parish in
Beverly.*

§ 5. In Massachusetts since the State Constitution was adopted in 1780, if persons of *one denomination of Christians* have been taxed in their parish, and have paid their taxes into the parish treasury, and have attended worship under a religious teacher of *another* denomination of Christians, he has in this action recovered for the monies so paid, (the amount of the taxes,) and the action has been brought by this teacher against the inhabitants of the parish into whose treasury the same have been paid. On the third article in the Massachusetts Declaration of Rights, the question has usually been, if the *religious teacher suing has been of a different denomination*, and if the party so taxed and paying has attended on his preaching, not what this party has been at heart. But it has been rightly holden, that the attendance must be sincere, not merely to avoid paying taxes; and on these principles, was the case of *Crossman*, a *Baptist* minister, decided against

this *congregational* parish in Beverly; and when this court, about the year 1802, decided a man to be a baptist must have been *dipt*, and that his taxes could not be claimed by a baptist teacher, unless he had been, must have been determined on this principle, namely, unless the party so paying the tax had been *dipt*, he was not, in the eye of the law, a baptist, and so his attendance was fraudulent in law, and only to avoid his taxes. The plt's. society was not incorporated.

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Quare, as to
this doctrine
and this case.

§ 6. In the foregoing cases are involved the general principles of this action for money had and received; but as the plt. in this action can recover, whenever in equity, and by the ties of natural justice or on moral principles, he ought to have the money of the deft., it is easy to perceive that this action may be continually extended, as new cases turn up; and as this action thus goes on *moral* and *legal* principles, blended together in the case, each case stands, in a measure, on its own facts and principles. If A *falsely* represent himself entitled to certain lands, under certain statutes, to B, and receive money of him under an agreed sale, he may in this action recover it back. 2 Day's Cases 337.

Two objections have been made to the extensive use of this action. 1. As the plt. only states that the deft. owes him so much money, had and received to his use, promised to pay it; the deft. never can know with certainty, till the trial, what the plt. means to prove, or what the deft. is to answer to, and so he may often of necessity come to trial totally unprepared. 2. That to the demand so stated, the deft. must necessarily plead never promised; so that the matter or point tried, never appears on the record. To obviate these difficulties, which are usually more in appearance than in fact, (for the parties generally find in season, what the question will be, &c.) the English courts very properly sometimes require a memorandum filed, stating in substance the ground the plt. means to go upon. This in a good measure obviates the first objection, but not the second. Still it will not appear upon the record what point in the cause the verdict or judgment goes upon.

Cowp. 414,
Lindon v.
Hooper.

§ 7. In this case it was adjudged, that *assumpsit* does not lie to recover back monies, when the parties are in *pari delicto* &c., or *equally guilty* or *equally innocent*; for then both parties, in point of fault or innocence, being in the same situation, *melior est conditio defendentis* is a rule that applies, and in this case of *Gates v. Winslow*, as no fraud appeared, the court presumed the deft., who sold Canada lands, to which his title was bad, to the plt., and received the monies for them of him he sued for, was as innocent as the plt.

1 Mass. R. 66
Gates v.
Winslow;
also see *Bliss*
v. Thompson,
Ch. 11, a. 12.
—3 East 222.
—2 Bos. & P.
640.

§ 8. In this case the deft. fairly purchased a forged bill for a valuable consideration, not knowing it was forged, and present-

3 Burr. 1564,
&c., *Price v.*
Neal.

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2 W. Bl. R.
242, Farmer
v. Arundel.

ed it to the plt. on whom it was drawn, and he accepted it, and paid its contents to the deft., who acted *innocently*. The court held that the plt. could not recover back the monies; that it was not against conscience for the deft. to retain them, as he paid a consideration; the plt. made no objection at the time he accepted and paid the bill, nor did he make any inquiry, and therefore if a fault any where, it was his.

§ 9. The plt. paid £8, 9s. 10d. to the deft., fairly due for the support of a *pauper*, which the deft. could not have recovered. The court held the plt. could not recover back the money. In this case the plt. was under a moral obligation to support the pauper, though this alone was not a ground of *action*, but was of an *actual* promise, and when he paid the money he could have no more right to recall it, than he could have had to resist the performance of an actual promise. The parties in this case acted as overseers of the poor in their two parishes. In this case De Grey, C. J. said (and the other justices concurred in opinion) that when "money is paid by one man to another, on a *mistake* either of *fact* or *law*, or by *deceit*, this action will certainly lie. But the proposition is not universal, that whenever a man pays money which he is not bound to pay, he may, by this action, recover it back. Money due in point of honor or conscience, though a man is not compellable to pay it, yet if paid, shall not be recovered back;" as a *bonâ fide* debt, barred by the statute of limitations, this is an honest debt, said the court, and being paid cannot be recovered back. This action does not lie for the selectmen of a town against a pauper, to recover back money advanced for his relief. Chipman's R. 45.

1 Day's R.
Connecticut
in Error, 130,
134, Buckley
v. Stewart.—
1 Esp. R.
377, Bailey v.
Lechmere.—
2 Eq. Cases
Abr. tit.
Award.

Kirby's R.
130.

§ 10. This was *assumpsit* for money had and received, and the court held, that "*assumpsit* for money had and received, though governed by equitable principles, and not to be sustained in opposition to equity, cannot be substituted for that mode of relief which belongs only to chancery." The court in this case must have gone upon the ground, that relief to be had only in chancery, can be sought for only in that court, and not in the courts of law. After all, it must be confessed, from a view of all the authorities and adjudged cases, the line of distinction is by no means clear, and cases every day arise in which it is difficult to determine, whether the relief to be sought is confined to chancery alone or not. This action does not lie to recover back monies voluntarily paid, on an award.

Mass. S.
J. Court,

Nov. Term, 1792, Derby v. Pierce.—If several men be taxed, and indebted to a collector for one advertisement, and he demands and receives of one more than his part, he may in this action recover back the excess; 2 Day's Ca. 369, Findley v. Adams.

§ 11. *Duties paid by mistake, &c.* In this case the deft. took at Madeira five pipes of the plt's. wine, to bring to Salem.

two of them being leaky, as the deft. said, and replaced them, the three, as he also said, by three of his own. The deft. brought the five pipes to Baltimore, where the plt's. agent, by his order, received them and paid the duties. Held, the plt. might recover back the duties paid on the three pipes, by mistake, and on the deft's. misrepresentation, and because not paid on the plt's. wine, but by mistake on the deft's. wine. And in this case the act of the agent was viewed as the act of the principal, *qui facit per alium facit per se*.

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Art. 15.

§ 12. *General principles*. This was *assumpsit* for money had and received. And held, when money is paid in consideration of a contract, which is void for want of power in one of the parties, or for any cause, other than fraud or illegality in the contract; the money so paid may be recovered back in this action. In this case Fowler and his wife were seized of land in her right, and she in her own right and as attorney to him, made a deed of it to the plt., who paid for it \$160 &c., and gave his note for \$200. Plt. sued to recover back the \$160, the deed being void. See *Fowler v. Shearer*, ch. 130, a. 4. The note for \$200 was *nudum pactum*; the land remained with Fowler and wife. Land taken in execution by the deft., viewed as money, ch. 32, a. 10, s. 7.

7 Mass. R.
31, *Shearer*
v. Fowler.

§ 13. *Assumpsit for money had and received*. Nov. 25, 1793, the plt. lent the deft. \$500 on bottomry, on the Schooner, Charming Sally, the deft. owned, and on a voyage to the West Indies. He gave a bond in the usual form. She was captured in the voyage on her return by the British, and condemned in the lower prize court, but restored on the appeal, and the commissioners under Jay's treaty of 1794, awarded the owner the value of his vessel and freight, with interest. Judgment for the plt. for the sum lent, and interest received by the deft. under the said award. The plt. had sued on the bottomry bond, and judgment for the deft. in that action.

8 Mass. R.
340, 369,
Appleton v.
Crowning-
shield.

ART. 15. *For monies paid, laid out, and expended, recovered in this action &c.* § 1. The plt. may recover in *assumpsit* any monies paid, laid out, and expended for the deft's. use, and at his request, expressed or implied; and the law implies a request whenever the deft. ought, in justice and equity, to pay or contribute to the plt. The same principles govern in this case, as in the case for money had and received, but with several differences in their application; and the same general objections exist, that the deft. may not be able to be prepared for trial, and that the points decided do not appear on record. In the former case the deft. receives the plt's. monies, and in this the plt. advances, pays, and expends his own money for the deft's. benefit, and at his request, expressed or implied, in

CH. 9. ~~He carried them to, and sold three of them in, the West Indies,~~

Art. 16. circumstances in which the deft. is bound in equity and by the ties of natural justice to reimburse the plt.

2 T. R. 100,
106, Tous-
saint v. Marti-
nent.—Imp.
M. P. 189.—
7 D. & E.
568, Cowley
v. Dunlap &
al.

§ 2. As where the plt., as surety, joins in a bond or note with the deft., and pays the debt. The plt. has this claim against the principal, the deft., for the amount, as money paid to his use; but not if the plt. had taken a counter bond, for the amount engaged for, for then he has a special contract and security, to which he must resort, for reasons before mentioned; also, after stated.

8 T. R. 186,
Merryweath-
er v. Nison.—
2 Bos. & P.
268.—3 East
169.

§ 3. If A recover in *assumpsit* against two defts., and levy the whole damages on one, he may make the other contribute in this form of action for a moiety; but it is otherwise in cases of *torts*, for these are in their nature several, and each wrongdoer is originally liable for the whole, and two partners may join against one, if they pay money by his bad conduct.

1 T. R. 20,
Stokes & al.
v. Lewis & al.

§ 4. But *assumpsit* for money paid, laid out, and expended, does not lie, when the money has been paid against the express consent of the deft. As where two parishes have been used jointly to choose a sexton, and pay him, and then one elects one, it cannot make the other pay part of his salary; it is not paid on the *express or implied consent* of the parish not electing. And so one never can make me his debtor by *voluntarily* paying money to my use, and against my consent. And there never can be the deft's. express or implied consent in favour of the payment, when he expressly forbids or disavows it. See *Jenkins v. Tucker*, ch. 9, a. 20, s. 24; and *Hunt v. Bate*, *Dyer* 272; *Hob.* 105; *D. & E.* 20; 1 *Rol. Abr.* 11, and *Hawkes v. Saunders*, another chapter.

8 T. R. 310,
Exall v. Part-
ridge.—1 H.
Bl. 90.

3 T. R. 418.—
Petrie, exr.
v. Hannay,
in 1 Com. D.
203.—See
sect. 10.

ART. 16. *On illegal contracts.* § 1. In 1773, Keeble, Sadlier, Petree, and Haunay, joined in *stock-jobbing*, against the statute; all their acts were illegal, except the transfer of £10,000; incurred losses; and Jan. 8, 1774, settled with *Portis*, their broker, who had paid all the differences. Keeble repaid him all he had advanced, except £811 part of Hannay's share of the losses. For this Keeble drew a bill on him, in favour of *Portis*, which Hannay, the deft., accepted. This bill not being paid, *Portis* sued Keeble's executor, the present plt., who on recovery paid the bill, no defence being set up on account of the illegality of the transaction. £264, part of the sum the deft. accepted the bill for, was his part of the loss arising from the transfer of the £10,000. The plts. sued to recover the sum they had paid *Portis*; the declaration was for money paid by plt's. to the deft's. use. Verdict was for them for their whole demand. A motion was made to set the verdict aside, or to reduce it to the £264; this motion was denied.

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This bill as to the £264 was fair ; as to the rest of the bill Lord Kenyon was inclined against the plts. But Buller and the other two judges seemed to go on this ground, that this act was not *malum in se* &c., but *malum prohibitum* only ; that though the law will not raise a promise out of such an illegal transaction ; yet here was the deft's, *express* promise and consent ; that he *in fact requested* Portis to pay the differences, and *actually* assented, which, in case of *malum prohibitum*, gave Portis an action against the deft., if so, the case was clear, that the deft., in fact, promised the testator by accepting the bill ; so an express promise in such a case and good ; that after this the deft. was bound in conscience to pay, as consenting and being privy, and if Portis had been plt. he might have recovered. And Buller J. said, that in a *legal* transaction " if one partner pay the whole partnership debt, without any express promise from the other, the law gives him a right to recover it back, in an action for money paid to the use of the other partner : and it proceeds on this ground that both are liable to pay. But in case of *illegal* contracts, as they are not bound to pay, one of them cannot acquire a right of action against the other, by paying the whole *without his consent* ; in such cases it is necessary to have the consent and direction of the other." That the court here may infer, " that the money was paid with the knowledge, consent, and authority of the deft. ;" and, that also " Portis paid the money with the consent of the deft." Buller J. relied on *Fackney v. Reynous & al.* 4 Burr. 2069, 2073. There, Fackney the plt., and one Richardson were partners, and Fackney paid £3000 in *stock-jobbing business*, against the statute, £1500 on his own account, and £1500 on Richardson's account, and the defts. gave the plt. their bond for £1500 for what he had paid for Richardson, and held good. The paying the £1500 was not *malum in se*, but only prohibited by the act of Parliament. According to these cases if two men be partners, and one pay \$100 for *smuggling goods*, which is *malum prohibitum* only, though the law will raise no promise in the other to pay his half, yet if he give his note or bond, or make his *express* promise to pay, this he will be held to perform.

Fackney v.
Reynous.

§ 2. The deft. and others engaged in stock-jobbing business against the statute. One Wilson, his broker, paid the differences for the deft. He and Wilson referred, and the award was, that there was due £306 12s. 6d. from the deft. to Wilson ; for £100, part of which Wilson drew his bill on the deft. who accepted it, and Wilson endorsed to the plt. who was one of the referees ; he was nonsuited, because the bill grew out of a *stock-jobbing transaction*, and the plt. knew it, and the bill was given for the difference.

6 T. R. 61,
62, Steers v.
Lashley.

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2 H. Bl. 379,
Mitchell v.
Cockburn.—
6 T. R. 405.
Both v.
Hodgson.

Doct. & Stud.
38.

Mass. S. Jud.
Court, Lin-
coln County,
June 1800,
Turner v.
Dodge.

See Gaming.

4 T. R. 466,
Clugas v.
Penaluna.—
Comp. 341,
Holman v.
Johnson.

6 T. R. 596,
&c., Waymit
v. Reed. See
Briggs v.
Lawrence,
3 D. & E. 454.

2 H. Bl. 379,
Robertson v.
Tyler.—Wat-
son's Part.
114, 115.

2 Bos. & Pul.
371, Aubert
v. More.—
Watson on
Part. 116.

§ 3. The plt. and deft. were partners in the insurance of ships &c. contrary to the statute of 6 George I. The business was carried on in the plt's. name, and he paid all the losses. He cannot recover of the deft. a share of the monies paid ; for the plt. entered into illegal contracts to which the deft's. consent was not implied by law. The law will not raise a promise to an illegal purpose.

§ 4. An agreement to *dispense with deceit* is contrary to good morals, is indecent, and void ; upon the general principle that the law forbids every agreement or contract to do or have done any thing that is *immoral*.

§ 5. In this action the plt. sued for a balance of £30 on account, the deft. offered to pay £12. They played a game at cards to decide whether the deft. should give his note to the plt. for £30, or £15, the plt. won, and the deft. gave his note for £30. The court adjudged this to be a good note, on a plea on the statute against gaming ; but was the play lawful ?

§ 6. In this action it was holden, that if A, an inhabitant of Guernsey, *knowingly* sell goods to B to be *smuggled into England*, and *assist him for the purpose*, the contract of sale is void, and A cannot recover ; but otherwise, if A be a *foreigner*. So possibly if A had not assisted.

§ 7. But in a later case the same disability was extended to a *foreigner*, as when the plt. of Lisle sold to, and *packed up goods for the deft., in a suitable manner to be smuggled into England*, though he was not concerned in the risk of importing the goods into England ; and the court held he could not recover the price of the goods, for *so packing them was assisting* in the smuggling. The assisting was the objection.

§ 8. No implied promise arises out of an *illegal* transaction, as if A and B be concerned in illegal insurances, and A pays the losses with B's express consent, he cannot compel him to pay his proportion of the losses so paid ; but here was no express contract.

§ 9. In this case all the former cases were examined, and the authority of Mitchell v. Cockburn fully recognised. This was a case of losses paid by one partner on illegal insurances, and referees had awarded the other *should* contribute his part, and the court held the award was bad, and it was set aside. In this case the court seemed to doubt the distinction, between the cases of money paid by one man for another in *malum in se*, and *malum prohibitum* and Rooke J., thought that "every moral man is as much bound to obey the civil law of the land, as the law of nature." And on the whole, the sound principle is, the law will not raise or imply any promise in aid of a transaction forbidden by the law of the land ; but it does not follow, the law will lend its aid to defeat an *express* contract, as a bond or note, or the maxim *melior est conditio possedentis*.

ART. 17. *For monies paid by sureties, bail, &c.* § 1. It is a settled principle in law and equity, that if a surety or bail pay his principal's debt, he may have this action for monies paid, laid out, and expended. The only question of any difficulty is, *when* he may have it. Dig. 12. 4. 4.—Fide-jussor Dig. 46. 16. 7.—Dig. 17. 1. 38.

§ 2. It has been holden, that 'if the surety pay the debt of his own accord, though not arrested or sued, he may sue his principal. If there be a bond of indemnity, it is not necessary that the same should be sued, for if the surety pay the money without suit, the bond of indemnity is forfeited.

§ 3. For the mode of indemnifying a surety, see the article, *Save harmless*, and *Symonds v. Wheeler*.

§ 3. "The principal is not indebted to the surety, till he is obliged to pay the debt for him," and if this do not happen till after the bankruptcy, the surety cannot prove his debt under the commission. In ancient times if the surety paid the bond, he could not recover of the principal. It is well settled, that a surety need not wait till he is sued, but he may pay the debt when it becomes due, and when also judgment is recovered against him, so that his person or estate is exposed to execution, he may sue his principal for monies *paid to his use*, and *at his request, implied in law*; and this where the surety relies on the *legal assumpsit*, raised merely by the operation of law on the *substantial principles of justice and equity*.

§ 4. But whenever the surety takes an *indemnifying bond in fact*, or other security, he may then sue according to the tenor of it; *for he may lend his credit for what time, or on what terms he pleases*; the surety is damnified by payment or judgment against him, though no execution has issued; for the reasons elsewhere in this article mentioned.

§ 5. So if the surety be sued, and obliged to retain in his case counsel, he is damnified, and whenever he is damnified he may sue. In one case it is stated, that if the money be not paid, by which *the surety is chargeable, and dare not attend his business*, he is damnified and may sue.

§ 6. And in another case it is stated, that if the money be not paid at the day, it is a present forfeiture of the counter bond; *for he has put the plt. in danger of being arrested*, and it is a present damage. And in another case it is stated, that if the creditor endeavour to *arrest the surety*, he may call on his principal for indemnity; but though the surety is thus damnified, yet the amount of his damages will depend on the circumstances of the case.

§ 7. On the *counter security* the surety may sue according to the provisions of it. As where, Nov. 1783, the surety joined in the *original bond* with his principal to A, to pay March

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Ch. 82, a. 35.
Who is surety.—1 Mass. R. 156.

5 Co. 24,
case of
Broughton.—
1 Esp. 265.

See Jenkins
v. Tucker.
Ch. 9, a. 20,
24.—Kirby's
R. 187.—2 Bl.

Com. 70,
Chris. Notes.
—Cro. Jam.

127, 288, Os-
born v. Brad-
shaw.—Cro.
El. 26, Bush
v. Ridgely.—
Cro. El. 369,
Whight v.

Harvy.—
3 Bl. Com.
13, Chris.

Notes.—2 T.
R. 106.—
1 Hen. & M.

449, Merrill
v. Johnson's
adm.—4 In.

Cl. 454, 430,
437.—Cro.
James 339.—

2 T. R. 100,
stated in Ch.
169, a. 2.—In.

Cl. 436, 442.
—Mod. Int.
193.—4 In.

Cl. 437, cites
3 Keb. 336,
Bulstr. 233.—

10 E. 487.
3 Bulstr. 233.
—10 E. 4, 27,

28.—1 Saund.
21, Cutler v.
Southern.

2 T. 100,
Toussaint v.
Martinet.—

3 Wils. 262.—
7 D. & E. 548.

CH. 9. 1786, and took a counter bond to pay March 1784. And
 Art. 17. Buller, Justice, said a surety may lend his credit, if he will,
 only for three months. A surety damnified before payment
 must declare specially.

2 T. R. 640,
 Martin v.
 Court.—
 Dougl. 168,
 and Cowp.
 525, Taylor
 v. Mills.—
 2 W. Bl. 794,
 Goddard's
 case.—3 Wils.
 13, 17, Chit-
 ton's case.—
 1 T. R. 599,
 Paul v. Jones.
 —3 Wils. 346,
 Young v.
 Hockly, Chil-
 ton v. Whiffin.

§ 8. And in another case it was held, the surety was allow-
 ed by his counter security to get the amount of the debt into
 his hands from the principal, one day before the original debt
 become due, and so one day before the surety could be held
 to pay. The counter security was an *absolute* bond, with an
 endorsement, shewing it was to indemnify.

§ 9. But in *Taylor v. Mills* the court held, that the surety
 was not damnified, till he was called on and had paid, and
 could not sue on the *implied promise* before; (in the last case
 he paid on a judgment :) for till payment of the debt or judg-
 ment, there is a possibility the creditor may get his debt of the
 principal; but still the surety may be specially damnified in
 the above ways, and in others, though not by the payment of
 the debt. The surety's body being in execution, is equal to
 the actual payment of the debt, as it respects the surety him-
 self; but it is conceived not as it respects the principal, and
 the amount of damages to be attended to.

Chan. Cases
 246.—Chan.
 R. 34, 120,
 150.—2 Com.
 D. 667, 668.
 —3 Bac. 78.

§ 10. In this action for monies paid by a surety, another
 material question is, how far another surety is liable, and when.
 Sureties are equally charged in equity, Hob. 264, and in
 equity one surety may compel another to contribute towards a
 debt for which they were jointly bound. If a surety pay, he
 shall be relieved. If one surety pay the whole, he shall be
 relieved against the other sureties. If two be jointly bound, and
 one dies, equity will deem his representatives to be charged
pari passu, with the survivor.

Ca. Ch. 246.
 —1 Ch. R.
 35, 120, 150.

§ 11. So if three are bound in a bond, recognisance, &c.
 and one only is sued, and pays the whole, and another is insol-
 vent, he who has paid shall have contribution against the third
 for a moiety, though in another case it was held the third
 should pay only a third. *Quære*, as to this last case.

1 Vern. 466.

§ 12. So by the custom of London, one surety paying the
 whole debt shall make the other sureties contribute.

3 Cranch.
 493, where
 assumpsit lies
 on a letter of
 credit.

§ 13. As there is no court of Chancery in Massachusetts, to
 carry these principles, founded in justice and equity into
 effect, it is done by this action for money paid, laid out, and
 expended; the practice of this State hitherto has been limited
 in this respect, but as far as it has gone, it has adopted the
 same course nearly, as chancery has pursued.

Mass. S. J.
 Court, Ken-
 nebec Coun-
 ty, July 1799,

§ 14. Therefore where, September 2, 1767, one William
 Tufts sold land to B. Tupper, Obadiah Hussey, Robert Bar-

Tupper's adm. in review, v. Hussey.

ker, and James Folger, and gave them a deed as *joint tenants*, and they paid him a part of the purchase money down, and gave him their joint and several bond for £460 13s. 4d. the residue. Prior to 1781 Hussey and Tupper each paid his quarter part of the bond, Folger paid £100, and Barker £22. Barker died *insolvent*; the administrator of Tufts got judgment against Hussey in 1791 for £599; this his estate paid. Folger, as was said, was insolvent. In 1793, the administrator of Hussey's estate brought this action against Tupper, and July, 1796, recovered half the sum Hussey had paid, debt and costs, about £300; and on this residue in 1799, Hussey's administrator had this judgment confirmed. And the court held, that Tupper was liable in this action for monies paid &c. to pay half what Hussey had paid; that is, half of the deficiency of Folger and Barker, and merely as joint obligors; for Tupper had long before paid his own quarter part.

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§ 15. The same principle holds among sureties. Hence, if there be three, and one fails, the other two must share the loss equally.

§ 16. In this action it was decided, that an action for money had and received does not lie for a surety who has paid his principal's debt, but one for money laid out and expended lies for him, and he may recover, though the money was paid on a *usurious* contract, which the principal might have avoided, for it is not for him to say his surety ought to have avoided it.

1 Mass. R.
139, Ford v.
Keith.

§ 17. If the surety pay more than the debt, it is his own loss. As in this case, December, 1786, Wheeler as *principal*, and Simonds as *surety*, gave their note to John Fiske Esq. to pay him, February 26, 1787, £600 in the securities of the United States of a certain description, then worth 2s. 2d. in the pound. Wheeler paid all but £130 and interest; in all, £150. November, 1792, Simonds, the surety, paid this sum £150, near 20s. in the pound, or about £105 above the value of the debt in the market, February 26, 1787, when payable. Simonds then, as *surety*, sued Wheeler, as *principal*, to recover of him the £150; but June term, at Ipswich, 1793, recovered only £45, the real debt. In the case of this note, after several arguments, it was held, that the value of the securities February 26, 1787, the day of payment, was the measure of damages, and not their value at the time of the trial. See *Fiske v. Wheeler*.

S. J. Court,
Mass. 1793,
Simonds v.
Wheeler.

§ 18. In this case Mrs. Ansart, the deft., was *executrix* of her husband's will, and for a debt due to his estate took a note to herself as *executrix* for \$189,53 from his debtor; on this note Locke, the trustee, collected the money as her attorney;

3 Mass. R.
319, Coburn
v. Ansart &
Locke, her
trustee.

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3 T. R. 524,
Currey v.
Edenton.

the court held, that it was *her own debt or money*, and Locke was her trustee and debtor, and that she might have sued the note in her own right, and naming her executrix was but *surplusage*.

8 T. R. 308,
Exall v. Partridge & al.—
The surety cannot swear the debt is due to him from the principal, till the surety has paid his debt.
—3 Wils. 262, 272, Goddard v. Vandereheyden.

§ 19. If a *broker* buy goods for his principal, and agree for one third per cent. to *indemnify him from any loss on the resale*; if the principal have a fair opportunity to sell to advantage, but neglect it, the broker is discharged of his undertaking, as surety to guarantee the price, though the principal afterwards be obliged to sell at a loss.

§ 20. *Where the plt. pays by compulsion.* In this case the three defts., lessees of certain premises, were bound by covenant to pay the rent. The plt. put his goods upon them, (his carriage,) after he knew that two of them had assigned their interest to Partridge, the other co-lessee. He received the plt's. carriage, which was taken as a distress, for the lessor's rent. The plt., to redeem his carriage, paid the rent in arrear, compelled as he was by the circumstances of the case, and took a receipt from the lessor's attorney, as so much money received on account of the three defts. The court held, that the plt. ought to recover against them for so much money paid, laid out, and expended for their use, and that he was not held to look to Partridge alone.

Civil Code,
1806, Book
3; title 5.

§ 21. By the French law, the surety may oblige the creditor first to call on the principal, pointing out the means of payment.

6 T. R. 176,
177.—See ch.
169, a. 2, 5.
Several cases
of counter security to the
surety.

§ 22. The *surety's* deed does not extinguish the *principal's* simple contract debt, as the principal's deed or bond does; one reason of the difference is, several actions may be against several distinct contractors for the same debt, but several actions cannot be against one and the same person for the same debt.

ART. 18. *For monies lent.* If the plt. sue for monies lent, it must be to the deft. *himself*. And *agents and principals &c.*

2 Wils. 141,
Marriot v.
Lister.

§ 1. The word *lent* is a technical term, and can only be for money *lent* to the deft. *himself*, and not for money to a third person. If it be advanced or paid to a *third* person, it is not money *lent*.

3 Wils. 388,
Stevens v.
Hardy.

§ 2. But *assumpsit* for money *lent* to the wife, at the request of the husband, is good; this is, in fact, a loan to him. The money was *lent* to her, while he was absent on a voyage, at his request before he sailed. But it is well to declare for monies *delivered* to such third person at the deft's. request. The cases on this head require but little attention.

2 Wils. 141.—
Imp. M. P.
193.
1 Dallas 429,
430.—S. C.
Pennsylvania,
Dr. At-right v. Melcher.

§ 3. In an action for money had and received, no title deed of land is evidence of the *ground* of action, but it is of the sum; and good evidence, when not the *immediate foundation*

of the action, *but only leading to it*. In this case the deft. had received the monies for lands not to be found. Many authorities were cited in this case. The material ones of those for the deft. were Cowp. 414, 418, 818, 819; Dougl. 132; Salk. 210; Cro. J. 506; 2 W. Bl. 1249. Those for the plt. were, Dougl. 18; Salk. 22, 284; Buller N. P. 31; 2 Stra. 915; 2 Burr. 1088.

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§ 4. *Several cases. Customhouse duties paid by the plts. agent and principal &c. Assumpsit.* A Demerara merchant sent to the defts. forty hogsheads of sugar, to be delivered to them in Boston; but they were carried to Portsmouth by the master. The plts. and Swett, since deceased, who undertook to act for the defts., gave their bonds at the customhouse in Portsmouth for the duties on the sugar, afterwards transported to Boston to the defts. The plts. sent the drawback certificate to their agent in Boston, instructing him not to deliver it to defts., till they should indemnify the plts. as to the duties. Defts. sold the sugars as entitled to *debenture*, but could not obtain the certificate of the plts., and because not so indemnified. This the defts. refused to do. Hence, the drawback was lost, and the defts. had to allow it to the buyers of the sugars. Judgment for the plts. to the amount of the duties they paid; for it was reasonable the plts. should be indemnified, and till this was done, it was not unjust for them to retain the certificate, and the court added, "if this is not a sufficient excuse, then this is the common case of one man having paid money for another at his request." Where the real owner of the goods imported was liable, only as *co-surety* in a customhouse bond; the plt. imported his goods, and immediately consigned them to A, who became principal in such bond, and the plt. and deft. his *sureties*. Plt. paid the bond and recovered half of the deft.

7 Mass. R.
268, 271,
Long v.
Greene & al.

12 Mass R.
99, Taylor v.
Savage.

§ 5. *Agent and principal, as to contracts.* This was *assumpsit* against the deft., and held, an officer appointed by the government, and treating as an *agent* for the public, is not liable to be sued on contracts made by him in that capacity. And not, even if he contract *by deed*, if on *account of the government*. 1 D. & E. 674, 679. This was covenant on a charter-party, in which the deft. contracted *on account of his majesty*, and the court said, "and whether the contract be by *parol* or by *deed*, it makes no difference, as to the construction to be put upon it." So *Brown v. Austin* is on the same principle. Ch. 9, a. 20, s. 10. Brown procured witnesses in a public trial for the United States, and held, he was not liable to pay them. *Hodydon v. Dexter* to the same effect. 1 Cranch. 345. The law is the same as to an agent of a *foreign government*. 3 Dall. 384, Jones v. Le Tomb.—2 Bin. 201.—1 Wash. 199.

1 D. & E.
172, Mac-
beath v. Hal-
dimand.—
East 195,
579, Unwin
v. Wolseley.
—3 Cain. 69,
Brown v.
Austin.

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9 Mass. R.
273, Free-
man v. W.
Otis, cited
2 Phil. Evid.
14, 15.

§ 6. *So a public agent who engages for the public is not liable generally &c.* This was *assumpsit* by the master of a revenue-cutter, for the care of his vessel, and services of himself and men; and for *money had and received &c.* Facts. Jos. Otis, a collector of the United States in Barnstable, was infirm, and incapable of business, and his son, the deft., did the business of his office, and had the whole control and management of it, as deputy-collector, except, for the most part, official papers and accounts were in his father's name, and signed by him. Feb. 2, 1809, the deft. proposed to the plt. to charter or hire his schooner *Betsey*, as a revenue-cutter, and to employ him as master, with such men as he, the plt., should engage and employ as part of the crew; the deft. reserving to himself a right to engage a mate and the rest of the crew, to be attached to the customhouse, and in permanent service for six months, the vessel at \$180 a month, and the master and crew at the stated wages in the revenue-cutter. These terms the plt. accepted, and the bargain was closed. Thirty-six days after, the plt. and crew were discharged by the deft., who said, he would pay for their services when furnished with the money, as the witnesses understood it. The plt.'s account was rejected at the Federal treasury, on the ground the deft. had stated the plt. had been paid for all services. The said proposals were in pursuance of directions from the treasury, dated Jan. 16, 1809. In April or May, the deft. received \$1000 from the treasury to pay revenue-cutters; there, however, was some evidence, part of this sum was received in Feb., and had been applied to pay revenue-cutters previously employed. The deft.'s letters to the secretary of the treasury were to shew the hiring &c., for which the plt. demanded payment, were only a proposal on the plt.'s part, and not a conclusive contract. Jury found a contract of, and a verdict for, money had and received. The court held, "that where a public agent makes a contract in the name and behalf of the government, it is a point well settled, that the agent is not liable to the action of the party contracted with, who must look to the government; but if such agent should deny to the government that he had entered into such contract, and by such interference prevent the party from his remedy as against the government, he must be personally liable, as he has in his conduct, in effect, disavowed his acting in character of a public agent." So the verdict for the plt. is right. Quære, if the jury believed the deft. had received from the treasury monies intended to meet the plt.'s demand, and he had refused to pay it over, they were correct in their verdict for monies had and received. What a public agent may give in evidence, Cabot's case.

§ 7. This was *covenant broken* against the agent of the Massachusetts State Prison, on a covenant to furnish the plt. the labour of from twenty to forty convicts for one year, in plating and harness-making &c., and to furnish stock monthly, and provide tools &c., and to give the plt. the same power over them as the assistant keeper had. The plt. was faithfully to superintend them &c., and have half the profits. When the *agent* made the contract, he had power to do it, but he failed to perform. Held, he was not liable. Def't's. second plea was, that he was agent &c., and *as such*, and not otherwise, he made the contract &c., *hoc paratus*.

Promise to pay another's debt raised *by law* is not within the statute of frauds. See *Goodwin v. Gilbert*, Ch. 32, a. 4. The agent's power depends on his commission, not on what he professes on the face of his acts. 5 Wheaton 236.

Assumpsit on several promissory notes made by *agents*. And held, if one make a contract in writing, intending to act *as agent* and *bind his principal*, it must appear in the *contract itself*, *he acts as agent*, and parol evidence is not admissible to contradict, vary, or affect materially by way of explanation any written contract, within the statute of frauds or not, if the contract be perfect in itself, and is capable of a clear exposition from its terms. But yet the def't. may shew by *parol* evidence a want of consideration for a promissory note, in a suit between the original parties to it, or illegality or fraud in the transaction; nor does the rule extend to receipts.

§ 8. The plt. had an account for work &c. against the def't., and presented it to his *steward*, *Hunt*, for payment, receipted it as received of the def't., and took Hunt's own check for it, on a banker; this he refused, and also a second like check. Hunt failed; then the plt. applied to the def't. for payment, who refused on the ground, Hunt had sufficient funds of the def't's. to pay &c., and went off in his debt. Held, the def't., *the principal*, was liable; as it did not appear he was prejudiced by Hunt's (his agent) giving his checks &c., but if it had appeared, the def't. had, in the mean time, inspected his accounts, and had dealt with him on the ground *he actually paid*, as the receipt imported, then the def't. would have been discharged. And see several cases, Master and Servant, Ch. 47. *Farmer v. Davis*. See *Cushman v. Lohr*, where the act of the principal confirms that of the agent, Ch. 80, a. 1, s. 9, 10; and *Floyd v. Day*, Ch. 9, a. 19, 22, where the agent compromised the principal's debt.

§ 9. An agent received goods on condition to pay to B a certain sum out of the first proceeds. This acceptance the principal approved. Held, the agent was bound to pay B said sum, though the principal had previously assigned the goods

CH. 9.
Art. 18.

9 Mass. R.
490, *Davis v.*
Jackson.

11 Mass. R.
27, *Stackpole*
jun. v. Arnold
Welles
106.

3 East 147,
Wyatt v.
Hertford.

See also
Ward v. Fil-
ton, Ch. 33,
a. 2.

1 Johns. Cas.
206, *Neilson*
v. Blight.—
See Ch. 47, a.
6, s. 13.—
2 Phil. Evid.
14, 15.

CH. 9. to C, without the agent's knowledge. This payment to B was
 Art. 18. the condition of the first sale. See *Salter v. Field*, goods
 bought by an agent attached &c.

2 Johns. Cas. § 10. An attorney or agent received of his principal C's
 424, Arm- note to him to collect, and C being considered *insolvent* and
 strong & al. having absconded, D, in his behalf, offered to pay 13s. 4d. in
 v. Gilchrist, the pound of the debt. The principal made no objection to
 Ch. 47, a. 5, this offer, and the agent afterwards settled with D accord-
 s. 13.— 7 Johns. R. ingly. Held, the agent was answerable to his principal only
 179, 183. for the sum received of D. The principal's silence amounted
 to his assent to D's offer. See *Carew v. Otis*, 1 Johns. R.
 418, and 4 Johns. R. 377.

3 Dallas 87, If an agent pay over money after notice, he is liable &c. If
 88, 119.— he receive only a moiety of the proceeds of a prize, he is an-
 3 D. & E. swerable for no more &c., *Briggs & al. v. Lawrence*. Agent's
 454. receipt for goods binds the principal. See also Ch. 47, a. 5,
 s. 13, *Gibson v. Colt & al.* See Principal and Agent, Ch. 1,
 a. 16, s. 4.

12 Mass. R. § 11. Replevin for 8756 hides; held, if one *as agent* con-
 183, 180, tract for the purchase of goods, and part only delivered to
 Stevens v. him, and he received from his principal more money than the
 Robins. part delivered cost, including charges; he may hold more of
 the money to indemnify himself for his engagements on ac-
 count of a part not received, he had a lien on the hides or
 leather in his hands to answer his engagements.

12 Mass. R. § 12. *Assumpsit* for money laid out &c. The owners of a
 11, 14, Pack- privateer valued at \$25,000 in twenty-five shares, paid their
 ard v. Lie- agent that amount; but this was not sufficient to fit her out.
 now. They directed him to dispose of additional shares, and get
 her to sea immediately. Shares could not be sold. Plt., the
 agent, advanced his own money and sent her to sea. Held,
 the owners were severally liable to reimburse him his advances
 over the \$1000 a share.

12 Mass. R. § 13. Replevin for thirty-one boxes of sugar, marked &c.
 60, 65, Cle- Here was a sale by one assuming to be an agent, but not hav-
 ment v. ing sufficient power to make sale, may be rendered valid by
 Jones & al. the subsequent act of the owner, amounting to an adoption of
 the sale. The plt. wrote to one of the house which sold the su-
 gar, that he expected *to be paid immediately the proceeds of the
 sale*, and drew a bill accordingly. The known rule is, "that
 subsequent adoption of an act done by one assuming to be an
 agent, is equal in its effect to a precedent authority."

12 Mass. R. § 14. *Assumpsit* on a special contract &c. "It is mutually
 173, 176, agreed between *Wm. Ladd* and *Andrew Afridson*, that the
 Afridson v. said Andrew Afridson shall proceed to Alexandria, district of
 Ladd. Columbia, to act as flag-captain of a schooner belonging to J.
 G. Ladd, which is to be immediately fitted and sent to sea;

and the said Wm. Ladd agrees to allow the said Andrew A., for his services on board said vessel, sixty dollars per month, to commence the day after his arrival at Alexandria, and to pay his travelling expenses there; and the said Wm. Ladd agrees to allow the said Andrew A. five barrels privilege in the said schooner;" signed by both parties, and dated at Boston, Feb. 3, 1813. Wm. Ladd, it seems, meant to contract for J. G. Ladd, but did not so word the contract, and held, where one contracts as *agent for another*, and means not to be personally liable, the contract itself must shew the character in which he contracts, and that he does not intend to bind himself. Though the wages of a ship-master cease from the time of capture, yet where one engages as a *flag-captain* to protect the property, as *neutral*, at certain monthly wages, he must be held entitled to his wages, as well after, as before the capture, having been employed in defending the property from condemnation, and until his return. This contract was plain and intelligible in itself, and hence no parol evidence could be admitted to explain in what character Wm. Ladd meant to contract. Though it appeared in the contract, that J. G. Ladd owned the vessel, yet it did not appear in the contract, or in the signature of Wm. Ladd, he bound, or meant to bind J. G. Ladd, and the contract gave no action against him.

§ 15. *Assumpsit* to recover \$421 79 for glass, the plts. delivered to the defts. Held, where a parish appointed a committee of three to build a meeting-house, a contract made by one of the committee is not binding on the parish. He failed before the parish was called on, nor was the committee authorized to buy on the credit of the parish. It seems to have been the opinion of the Chief Justice, who tried the cause, that the parish, *as it received and used the glass*, would have been liable, if no loss had intervened by the failure of the committee-man, who contracted and gave his note for it, in behalf of the committee, as he expressed it. One really an *agent* drew a bill and fixed his own name only to it; held, *personally* liable, Ch. 20, a. 20, s. 32. One signed pro W. G., J. S. C. See Ch. 20, a. 20, 32.

§ 16. *Assumpsit* on a note, also for goods sold and delivered, same goods the note was given for. Arnold Buffum was the agent of the company, and his sub-agent in Boston was Frink Roberts, who gave the note for the company. Held first, where one, as attorney, executes a *sealed* instrument, and his power is questioned, it cannot go to the jury, until his letter of attorney is produced to the court, who are to judge of its competency. 2. In all simple contracts made by *agents* or *attornies*, in which the authority may be proved by *oral* testimony, the fact of signing and the power to sign being both questions

CH. 9.
Art. 18.

2 East 142,
Wilkes v.
Back.

6D. & E. 176.
—5 East. 148.

—Salk. 96.—
6 Co. 18.—
Cro. Car. 335.
—4 Ves. jr.
631.

2 Bos. & P.
565.

12 Mass. R.
185, 190,
Kupper & al.
v. South Par-
ish in August-
ta.—See 2
Vern. 127.—
1 Vern. 210.
—2 P. W.
266.—Ambl.
770.—1 Br.
Ch. R. 101.—
2 Br. P. C.
500.—Ambl.
495, 496, as
to a Principal
and Agent.

12 Mass. R.
237, 245,
Emerson &
al. v. the Pro-
vidence Hat
Manufactur-
ing Compa-
ny.

CH. 9. for the jury, the order in which proved is matter of indifference. 3. Though a general agent of a trading company, and one of it, may make notes to bind it, yet a *sub-agent* appointed by him cannot have such authority. 4. But he may buy on credit, if not prohibited, being appointed to buy stock and sell goods for the company, and bind the company. 5. The promissory note of such sub-agent, given on such purchase, not binding the company, will not extinguish the implied promise of the company raised by the law on the purchase. Roberts was admitted as a witness for the plts., though objected to; so was Hibbard, one of the company, not objected to.

12 Mass. R.
419, 425,
Dow jr. v.
Prescott.

§ 17. Assumpsit for money had and received; held, an attorney who has received monies due to his principal, with directions to pay it over, pursuant to an agreement with a third person, is liable to pay it to his principal at any time before he has paid it over to such third person. If A sign a note in B's name, as his attorney, and has no authority for the purpose, A is *personally* liable to him who accepts the note under such mistake or imposition. 3 Johns. Cas. 70, Dusenbury v. Ellis.

See Coburn
v. Ansart, Ch.
9, a. 17.

ART. 19. *When the plt. must, may, or may not sue in auter droit, or in his own right; various cases and principles considered.*

§ 1. It is often difficult to decide when the plt. must sue in *auter droit*, or in his *own right*.

5 Com. D.
868, Rush v.
Rush.

§ 2. 1st. Where the plt. must sue as *administrator* or *executor*. As where a bail bond is assigned to an administrator, as *administrator*, he shall sue as *administrator*, and not in his own right; here the old bond, taken in trust for the intestate, is kept alive as the ground of action, and the only ground of action.

4 T. R. 277,
Cockerill &
ux. exrs. v.
Kynaston.
—Lev. 165.

§ 3. The plt., as *executor*, declared on an account stated by himself and the deft.; this was deemed to remain a debt to the estate of the testator; and Buller J. stated the rule to be, that if the goods, the subject of the action, "never were in the *actual* possession of the executor," he *must* sue as *executor*, "and if the goods recovered would be assets" in his hands, he *must* sue as *executor*.

Salk. 207,
Jenkins & ux.
v. Plume.—
6 Mod. 92,
181.

§ 4. Holt C. J. said, that if the goods of the testator be taken and converted before they come to the hands of the executor, he *must* sue as *executor*, for they were never *assets*. If once *assets*, he is accountable for them, and then he *must* demand them as *his own*.

4 T. R. 281.
—Dougl. 4.

So whenever he has been in *actual possession*, they become his &c., but the goods are not *assets*, for which the executor is absolutely accountable, till he has *actual possession*.

§ 5. If the executor or administrator recover judgment for a debt due to the deceased, he may sue *that judgment in his own name*, and if he declare in *auter droit*, it is but *surplusage*. This was a foreign judgment at Calcutta. The plt. had judgment, but as a judgment does not put him in possession of the thing, he is not obliged to sue in his own right.

CH. 9.
Art. 19.

Dougl. 4,
Crawford v.
Wittal, in
notes.—
1 Vent. 119.

§ 6. 2d. The plt. may sue in his *own name* in all cases where the goods appear to be his own.

§ 7. If the testator, an attorney, begin business for A, and die, and *his executor* finish the business, and the deft. A promises to pay *the executor*, he may sue in his *own right*. This in fact never is a debt to the testator, though a part of the business was done by him, but being finished by the man who is executor, and the promise being made to him, it is properly his debt.

Stra. 1107,
Marsh v. Yel-
lowly.

§ 8. In this case the court held, that a count for money had and received to the use of the plts., *as executors*, by the deft., might be joined with a count for monies had and received by him to the use of the testator; both counts are to recover to the use of the estate.

3 T. R. 659,
Petrie, & al.
exrs. v. Han-
nay.

§ 9. *After* the testator's death, the deft. received his money, his executor may sue in his *own right*. By the testator's death, the money might come into the executor's hands, and so become *assets*; and if *assets*, it was his to be sued for.

5 T. R. 234,
235, Goldth-
waite & ux.
exrs. of Wood
v. Petrie & al.

§ 10. *If the cause of action never did arise to the testator*, the executor may sue in his *own name and right*, or *as executor*. So if A and B be partners, and A dies, and I receive their money, B may sue me in *his own right*; 14 Mass. R. 327.

See Carth.
322, Chap-
man v. Dar-
by.—
2 T. R. 476.
—Willes 103.

§ 11. In this case the testator's tenants owed him several sums of money for rent; *after* his death the deft., his steward, received the money, and so was never indebted to the testator himself. The court, on argument, held that the testator's executrix might sue for this money in *her own right*; 2 Salk. 421.

Willes 103,
107, Shipman
v. Thompson.
—5 Com. D.
569.—Com.
on Contracts,
526.

§ 12. If there be two partners in trade, and one dies, and then a third person receive partnership money, the surviving partner may sue in *his own right*, and need not as *surviving partner*; for the third person is never indebted to the partnership, as he received the money after the death of one of the partners. If the surety's administrator pays, he may sue in his own right.

2 T. R. 476,
Smith v. Bar-
row.—
14 Mass. R.
327, Mowry
v. Adams.

§ 13. So if the executor recover a *foreign judgment*, he may sue this judgment in *his own right*.

Dougl. 4.

So if an executor recover judgment against A, and he be taken in execution and escape, the executor, in his *own name*, may sue the sheriff for this escape, yet the damages when recovered are *assets*. By the judgment, the executor reduces

2 T. R. 126,
Bonafour v.
Walker.—
5 Com. D.
569.

CH. 9.

Art. 19.



4 T. R. 561,
Munt & al.
exrs. v.
Stokes.

the thing into his own *actual possession*, and becomes accountable therefor *as assets*, at least if he chuse so to consider the case, and then he has his election to sue for the escape in his own right.

§ 14. So if executors pay monies, they are not bound to pay, as on a respondentia bond void by statute; they may recover it back in their *own name*, if at all. Buller J. thought the executors should have sued in their own right; they paid a debt their testator was bound in conscience to pay, though not in law.

Mass. S. J. C.
Essex, Nov.
1793, Long,
adm. v. Long.
—2 Bac. Abr.
386.—Salk.
23.—1 Mod.
221.—5 Com.
D. 576, 644,
645, Geyer v.
Smith.

§ 15. In this case the plt., administrator, discharged the old bond due to the estate *of the intestate*, whereby it became immediate *assets*, and took a new bond to himself; this becomes his own and to be sued only in *his own right*. He sued on the discharged bond and failed. The debt was changed, because the new bond was in a different right; the debt due to the intestate was extinguished, and a new debt created to the administrator himself: and if in the new bond the obligee call himself administrator, it is but as surplusage. 1 Dallas, 347.

1 T. R. 487,
King v.
Thom.

§ 16. Buller J. held, that if the executors endorse the testator's note, they become *personally* liable, and cannot be sued *as executors*, but must be sued in their own right, for their endorsement cannot, by any operation of law, give an action, judgment, and execution against the effects or estate of the testator.

Cro. El. 145,
179, Hadman
v. Kingwood.
—2 Esp. 90.

§ 17. The good of the *church* belong to the *church-wardens*, and they may have trespass for taking them. They must commence their action whilst *in office*, but may pursue it after their office is expired.

3 East. 104,
Ord v. Fen-
wick.—
2 Selw. 102.

§ 18. If the testator pay monies to the deft's. use, and the executor, *as executor* of the surety, pay money to the principal's use, these matters may be joined in the same action. And if the surety's executor be compelled to pay the *principal's* debt, the law raises an implied promise to him to reimburse the *testator's estate*, and the money so recovered by the executor will be *assets*. And when there is a promise to *reimburse the estate*, the representative of it may, in his representative capacity, recover to its use.

Mass. S. J.
Court, Nov.
1787, Ellen-
wood, adm.
v. Fluent.—
Willes 105.

A was indebted to E. Ellenwood, he died, and B. Ellenwood became his administrator; after E. Ellenwood died, the deft., Fluent, received A's debt. Held, the administrator of E. E. might sue as *administrator*, or in *his own name*, for he might elect to make it his *own debt*, or the debt of the *intestate*. Deft. never had it by the plt's. consent, nor was he ever debtor to the intestate.

Willes 103,
Shipman v.
Thompson.

§ 19. 3d. Where the plt. has an election to sue in *auter droit*, or in *his own right*. In Willes there are sundry cases

stated, from which he extracts a general rule, and lays down the distinction to be, that if the "thing sued for be *assets* in the executor's hands, *before* the recovery, or where the cause of action arises, in *his own time*, and *never did arise to the testator*, the executor may sue in his own name, or *as executor*." CH. 9.
ART. 19.

§ 20. If the deft., receive a debt due to the testator, *after* his death, by the *executor's assent*, it is *assets* immediately, for then the executor gives it up to the receiver; and if without the executor's assent, yet his bringing the action in *his own right*, is such an assent, as *on judgment*, it shall be *assets*, and immediately, and before execution; for by suing in his own right he admits and affirms what he sues for is his own; and a further reason is, because it is recovered against a person who never was indebted to the *testator*, and the *original* debt was discharged.

§ 21. So if a debt never due to the *testator* be endorsed to his executors *as executors*, they may sue *as executors*. As where, December, 1781, Brand drew a bill of exchange on the deft. to pay £100 to A, this bill the deft. accepted; A endorsed the bill to the plts. *as surviving executors of Stevenson*, the deft. was sued as acceptor. It was objected that they could not sue *as executors*, but only in their *own right*, for the promise by law could not be made to them *as executors*, but only to them in their *own right*. The court held, that this action may be supported, and said, "it must be taken for granted the endorser was indebted to the testator, and to the plts. *as executors*; so he might endorse to the plts. *as executors*, and then they held the bill *as executors*, and on the acceptor's refusing to pay, they may declare upon the right in which they hold it. So in Goldthwaite's case above, they sued *as executors*, and it was holden, they might sue either way.

§ 22. Day, the deft., compromised the plt's. demand against her debtor, Pillsbury, and took his own note. Held, that Day became immediately indebted to her, the plt., to the amount of the sum compromised for, as for so much money had and received by him to her use, and that the note Day took was his, and she could not support trover for it against him: 9 Mass. R. 104.

§ 23. If a guardian to an insane person give a negotiable note *as guardian*, yet he is liable, and can be sued but in his individual capacity after his guardianship is discharged; and this *negotiable* note discharges the ward's debt to the plt., though given by the ward's guardian only.

§ 24. In a case like Goldthwaite's and Fluent's, it is said the plt. must sue *as administrator*, and that the debt is not *assets* till recovered. This case only proves, that when the execu-

—5 Com. D.
559.—Salk.
207, 314.—
Same case,
6 Mod. 92.

1 T. R. 487,
King & al.
exrs. v. Thom.

3 Mass. R.
403, Floyd v.
Day.—
Sec 2 Phil.
Ev. 118.—
1 Chitty on
Plead. 48,
151.

5 Mass. R.
299, Thatch-
er v. Dins-
more.

Salk. 314,
Eaves v. Mo-
cato.

CH. 9.
Art. 19.

tor sued *as executor*, for a debt the deft. received of the testator's *after* his death ; the plt. was not subjected to costs, because the court held, he was not obliged to sue in his own right.

1 T. R. 691,
692, Barry v.
Rush.

§ 25. If an administrator, *as such*, submit to arbitration, and bind himself, his heirs, executors, and administrators, he is bound in *his own right*, and must pay the sum awarded against him, whether he has assets or not ; for he cannot bind the estate of the intestate so as to give a judgment or execution against it. Then, as he cannot bind this estate, he must be personally bound, if bound at all.

§ 26. On a view of the above cases, the distinctions appear to be, 1st. If the debt never was due to the testator from the deft. *or any other, nor on the facts can be presumed to have been due to him*, his representatives cannot sue *as executors* ; and if they do sue as such, it is but *surplusage*, and the word *executors* may be stricken out.

2d. If the debt, the subject of the suit, ever was due to him, and was a *credit of his creating*, though not from the deft. but another, and received by the deft. without *the executor's assent*, they may sue *as executors*, or in *their own right*. In the first way, for the testator gave the credit, and his executors have done nothing to change it. In the second way, for the deft. himself never was indebted to the testator, but he has been indebted to the executors only. This debt to them they may well consider as a debt to *the estate*, and sue *as executors*, or if they chuse, their *own debt*, and sue in *their own names*, and charge themselves, if they chuse it, with *assets* to the amount of the debt received by the deft.

3d. If the action must be grounded on the deed or promise made to the testator, then they *must* sue *as executors* ; but otherwise, if they can ground their action on *their own possession* or any new promise *to themselves*.

These principles apply, with very little variation to the cases of guardians, agents, factors, &c., for when the right never was in, or promise to the *principal*, the action cannot be in his name ; but when in, or to *him alone*, it *must* be in his name, and when there is a ground of action in him, or in the one who represents him, the suit may be in the name of either.

§ 27. *Sundry cases.*

If an administrator hold a negotiable note in *auter droit* given to his intestate, he may endorse it and enable his endorsee to sue it. In this case the administrator merely passes the property, but his endorsement is his own, and he cannot thereby subject his intestate's estate to judgment and execution. Like principle—action lies not against one as *administrator* on his *own* promise, *though administrator*.

3 Wils. 1, 6,
Rawlinson v.
Stone.

2 Bos. & P.
78.

§ 28. In this case it was held that a promise to the testator, and a note of hand to the plt., as executor, could not be joined, for the note is a new security to the plt. himself.

CH. 9.
Art. 19.

§ 29. A count to the plt. as executor on a contract to the testator, and a count in his own right cannot be joined, as where the plt. sued as administrator of A, on *indebitatus assumpsit*, and on *insimul computasset* between the plt. and deft., for monies due to the plt. himself, for these are in different rights, and in the last count the plt. cannot sue in *auter droit*, for a debt due to himself.

3 East 106, is cited, Betts, ex'r. v. Mitchell.
2 Saund. 117 d. cites, Hob. 88, Herrenden v. Palmer.—
1 Salk 10, Rogers v. Cooke.

§ 30. But otherwise if the *insimul computasset* be made by the executor for monies due to the testator. See *Insimul Computasset*, ch. 38; and Petrie & al. ex'rs. v. Hannay, ante; and Cocheral & ux., ex'rs. v. Kynaston, above; also the next case.

§ 31. *This case was trover.* The first count was for a conversion in the testator's time, and the third count for a trover and conversion in the time of the executrix. And resolved they were well joined, and the last well sued in *auter droit*; for it seems the goods even in this third count had never been *actually recovered by the executrix*, and so, till so recovered, were deemed to be a part of the testator's estate, and not assets.

Cocheral & ux., ex'rs. v. Kynaston.

§ 32. But *Eaves v. Mocato* seems to be otherwise; in which it is said, if the trover and conversion be in the time of the executor, he must sue in his own right. But these cases are reconcilable, for in *Eaves v. Mocato* the executor's actual possession is understood; and in *Cocheral & ux., ex'rs. v. Kynaston*, the court understood the executrix had had only a constructive possession; and in both cases the goods are not deemed assets till actually possessed by the executor, and till then he must sue in *auter droit*, and after that he must sue in his own right, for then the goods become absolutely his, and assets. He must in all events account for them to the estate, though he lose this possession, and bring trover, and fail to recover. So as to a debt due to the testator, and received by the executor, or by a third person by the executor's order or assent, as in *Jenkins & ux. v. Plume*, above. And so if the third person receive it, and the executor sue in his own right, it is assets in his hands; for by suing for it in his own right, he considers it his own debt, and the debt to the testator as discharged, as much as if he took a note or bond for it to himself; especially after judgment, when it becomes *res adjudicata* to him in his own right; and see *Long, admr. v. Long*, above. But he may elect to make it thus his own, or sue as executor, and still consider it as a part of the testator's estate, and not assets till recovered, as in *Ellenwood, admr. v. Fluent*.

Salk. 314, Eaves v. Mocato.

§ 33. *As to rent.* The declaration in 3 Wentworth 7, and in

CH. 9. American Precedents, 159, in which the executor, as such, sues
 Art. 19. for rent in his own time, is on a lease made by the testator himself, and so the testator's contract is the ground of the action.

Str. 1270,
 Hookin v.
 Quilter, cited Imp. M.
 Pr. 298 ;
 same case is
 in 1 Wils.
 171, 172.

§ 34. But otherwise if no such contract, and the rent due in the executor's time may be sued for in his own right. An executrix sued for rent in one count due to the testator in his time, so the second count ; and for other rent in her own time in a third count, and promise to pay her as executrix ; and in a fourth count for the use and occupation of her own house, and had judgment by default. This reversed on error. " For *per curiam*, there being no verdict, we can presume nothing but that the fourth count is as it appears, in her own right, which cannot be joined with the others, and the damages are entire." And Imp. 298, Buller J., said, for rent due in the executor's time, " he need not declare as executor." In the fourth count she did not sue as executrix ; and in Wilson's report, Dennison J. said, an executor may sue for rent in his own time, " without naming himself executor, and if he names himself executor, it is *surplusage* ; and he pays costs where it is for rent in his own time as executor."

10 Mod. 254,
 Johnson v.
 Gardiner, in
 error.

§ 35. The testator owed the plt. a debt, and the executor promised to pay it at a future day, and was sued as executor. Court held, that naming him executor was *surplusage*, for it appeared on the face of the record, the demand was in his own right against him. See 9 Co. 93 ; Cro. El. 91, 406 ; Hob. 188.

5 Com. D.
 560.—Allen
 76.

§ 36. An action against an executor for rent due, part in his own time, and part in the testator's time, may be in the *detinet* only. But see the distinction in the next case.

Cro. El. 712,
 Body v.
 Nargrave.

§ 37. If the administratrix occupy an estate leased to her intestate after his death, she is chargeable in her own right, if charged merely on account of use and occupation, and taking the profits, but as administratrix, if she hold on her intestate's contract in his lease to pay rent. The distinction is plain ; in one case the administratrix continues in possession on the lease to, and contract with her intestate, and this is the ground of the action, and not any promise of her own. In the other, by reason of her own occupancy alone, and taking the profits, the law implies her personal promise to pay.

6 T. R. 591,
 Gardner v.
 Bailee.

§ 38. If B have a power of attorney from A, to act for her as executrix, B cannot accept a bill of exchange to bind A in her own right, though for a debt her testator owed.

1 Cro. Car.
 Dorrel v.
 Collins.—
 10 Mod. 316.

§ 39. If an administrator grant all his goods and chattels, a term he has as administrator does not pass ; for it is not *suum*, but he has it in the right of the intestate. But if he have a lease in land as administrator, and has no other right or interest in it, the term he has as administrator passes, his intent is to pass it,

but by general words it does not pass ; but when he has only this interest, and grants all his right and interest in the land, his term necessarily passes or nothing does, and it is clear the parties meant something should pass.

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§ 40. In this case the court held that an executor cannot be charged as such for money had and received by him, or for money lent to him, or on an account stated, of money due from him as such ; all these charges make him personally liable. So for rent on his own lease of land he has as executor. These points are clear, except as to the account stated.

1 H. Bl. 108,
114, *Rose &
wife v. Bow-
ler & al. ex-
ecutors.*

§ 41. If a bond be made to husband and wife, administrators of A B, he alone may declare upon it, as on a bond to himself, for this is the legal effect. The bond to the wife is to the husband, and the bond to him is in his own right.

5 Com. D.
554.—4 T.
R. 616, *An-
kerstein v.
Clarke.*

§ 42, 43. Counts were on promises made by the intestate ; the fourth stated, that after his death the deft., as administratrix, and the plt. accepted together " of money owing from the intestate, and in consideration of the intestate being found indebted," the deft., as administrator, promised to pay. Held, no misjoinder of action, that the deft. was charged as administrator in all the counts, and that this was the common mode of declaring, to save the statute of limitations. And this seems to be the true principle, for though the administrator liquidates and adjusts the debt, and thus there is *pro formâ*, an implied promise to pay the balance or foot, yet this *insimul computasset* is nothing more than an act to ascertain the amount of the debt due from the intestate's estate, not to vary it or to create a debt ; but the real ground of the action is the debt the intestate did owe, a debt due from his estate, (which may be insolvent, and not in a condition to pay five cents in a dollar,) and this is all the plt., the creditor, can be entitled to. And on what sound principle of law or equity can the debtor's administrator be personally liable to pay the whole out of his own estate, the effect of a suit and judgment against him in his own right, merely because he joins in the account, to liquidate and ascertain merely the exact amount of this debt his intestate owed, though not exactly liquidated, a mere ministerial act very fit and proper for the administrator, as such, to do. And as, in our law and practice at least, the administrator receives no compensation, but merely for his services, what consideration can he possibly be considered as receiving as the motive or ground to make this debt his own, to subject himself personally to a suit and judgment for it, and himself and estate to pay it as his own, or in his own right. In fact it is a part of the duty of an executor or administrator thus to adjust an account, and strange indeed must it be if for thus doing his duty he subjects his own estate to a debt.

1 H. Bl. 102,
*Secar v. At-
kinson.*—
2 Selw. 707.

CH. 9. ART. 20. *When one agrees to pay another's debts, how far*
 Art. 20. *assumpsit lies, and how far there must be a written promise.*
 See Ch. 32, a. 7.

Salk. 28,
 Love's case.—
 27 Darnel's
 case, Buller's
 N. P. 276.—
 Cowp. 129.
 Salk. 14,
 Roe v.
 Hough.—
 12 Mod. 133,
 the same
 case.

§ 1. On a *scire facias* the officer took the debtor's goods in execution, and A. D. promised the officer to pay, if he would restore the goods. The consideration is good and sufficient, and an action of *assumpsit* lies against A. D., and 1 Ld. Raym. 357, *Waters v. Glasson*.

§ 2. B owed A £42, and C in consideration A would accept him to be his debtor for £42, which the said B owed A, promised A to pay the same. C is liable. C was sued, and it was not alleged that B was discharged. Verdict for A, and it was adjudged that as the promise could not bind C, unless B was discharged, it was construed a mutual promise, to wit: that C promised A to pay the debt, and in consideration thereof A promised to discharge B; there does not appear to have been any objection made that C's promise was not in writing, though to pay B's debt, and A. D. 1697.

Cowp. 460,
 463, Adney's
 case.—3 Dal-
 las 384.

§ 3. June 10, 1773, Henshaw gave his negotiable note to Buckholme for £306 13s. payable in 5 months. July 1773, Henshaw wanted further credit of B, Adney applied for it, and B. declined giving it. Adney told him that Henshaw was a safe man, that he, Adney, for £1 10s. 7d. premium, would guarantee the payment of the said note, to which proposal B. agreed, and paid Adney the £1 10s. 7d., and delivered more goods to Henshaw. July 1773, Adney, in writing, prom sed B., "in consideration of £1 10s. 7d. received of J. B. *I hereby make myself answerable* for the due payment of said note."

September 8, 1773, Adney became a bankrupt. Henshaw did not pay the note when it became due, Nov. 10, 1773, but continued his trade till December 2, 1773, when he became a bankrupt.

The court adjudged that the said Adney's said guarantee was *collateral*, to pay if Henshaw did not at the time, and so contingent, and no debt to B. till Henshaw failed to pay. One reason was the smallness of the sum, £1 10s. 7d.

Mass. Act,
 June 20,
 1788.

§ 4. By this act it is provided, that no action shall be brought "whereby to charge the debt. upon any special promise to answer for the debt, default, or misdoings of another person"—"unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." The Province Act of 1692 was the same, and the Act of 29th of Charles 2d. is the same, the others being copied from that of Charles 2d.

Province Act
 1692.

PROMISE TO PAY ANOTHER'S DEBT.

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§ 5. In applying this provision, many nice questions have arisen when one promises for himself, or another. A, in consideration B would deliver him his household goods, and C would discharge B from execution, promised to pay C the amount of the execution: held, A's promise was original. 8 Johns. R. 376, *Shelton v. Brewster*; 2 East 325; see Ch. 32, a. 7, s. 2.

§ 6. Tuack, the testator, sued one Johnson for assault and battery. The trial came on; Nash being in court, promised if Tuack would not go on to trial, but withdraw his record, to pay him £50 and costs, equitably taxed. On this Tuack withdrew his record and proceeded no further in the cause. Read, his executor, sued Nash on this promise; he pleaded never promised, and 2d, the statute of frauds. To the second plea there was a general demurrer, and the plea was held to be bad, for Johnson "owed no debt, the cause was not tried; he did not appear to be guilty of any default or miscarriage." He never was liable to the particular debt, damages, or costs. The true difference is between an *original* and a *collateral* promise; the first is out of the statute; the latter is not, where it is to pay the debt of another, already contracted. Judgment for the plt. Cited 1 Phil. Evid. 351, 362.

§ 7. An action does not lie against a foreign consul, on a bill of exchange, drawn in his *official* character, on his government, because when the holder takes the bill, he knows it is not drawn on the consul's own private credit, but solely on that of his government, and that he, in the affair, acts only as representative of that government.

§ 8. *Assumpsit* for that the plt. had sued one A. B. for a certain debt, and the deft. in consideration the plt. would stay his action against A. B., promised to pay said A. B's debt. On demurrer the case was held to be within the statute of frauds; *for here the deft. promised to pay the subsisting debt of another*; nor was this case like the case of Nash above, in that no debt existed.

§ 9. One Taylor owed the plt. Williams £45 for rent of a house, and becoming *insolvent*, made a bill of sale of the goods in said house to the deft. Leaper, in trust for Taylor's creditors. While the deft. was in *possession of the goods on the premises*, the plt., the landlord, came to distrain for the rent, (the goods being liable,) whereupon the deft. in consideration the plt. would not distrain the goods, promised to pay him the £45. On this promise the action was brought, and judgment was given for the plt. For the court held there was not a promise to pay the debt of another; *the goods were debtor and liable*; and the deft. was as bailiff to the landlord. It was a new contract; the deft. had an interest; and the plt. gave up his right

1 Wils. 306,
307, *Read v. Nash*.
6 Mod. 206,
is a like case.
So liable to
pay another's
debt when
the promise
is on a new
considera-
tion, &c.
10 Johns. R.
412, 414.

3 Dallas 384,
Sup. Court
of the U. S.

2 Wils. 94,
*Fish v. Hutchin-
son*.—
2 Selw. 736.

8 Wils. 308,
Williams v. Leaper.—
Imp. M. P.
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7 Johns. R.
463, 465.

1 Mass. R.
208, Brown
v. Austin, in
error.

2 Ld. Raym.
1085.—Imp.
M. P. 164.—
4 Johns. R.
287, Elting v.
Vanderlyn.

2 T. R. 80,
Matson & al.
v. Wharam.—
Imp. M. P.
165.—Cited
2 Selw. 736;
and Roberts on
Frauds 208,
209, 210.

Christian's
notes on Bl.
Com.

to distrain the goods; and this was a good consideration, and the deft's. promise was a new one. But still was it not a promise to pay *Taylor's debt*, the debt of another, and so within the statute? The idea *the goods were debtor*, and so the deft. only promised to pay the debt they owed, is perhaps too refined. In fact the goods were not absolutely debtor, they were but as a pledge. The plt. had only a *lien* on them, while upon the premises, and he was under no obligation to resort to it. The £45 was clearly Taylor's debt by contract, which fixed the rent and the amount; and whatever *lien on goods* or *collateral security*, the plt., the landlord, might have, still this was Taylor's debt, the debt of another, the deft. by his promise engaged to pay, but not in writing. And this case was very much like that of *Fish v. Hutchinson*. In each case there was a good consideration, but in neither a promise in writing. 2 Selw. 741. But Lord Eldon has observed that to hold the deft. the debt must be his *own*, or there must be a note in writing, but there may be an exception, as "if a person obtain possession of goods, on which the landlord has a right to distrain for rent, and he promises to pay the rent, though it is clearly the debt of another, yet a note in writing is not necessary."

§ 10. In this case Aaron Brown engaged to collect evidence in the case of a contested election of a member of Congress, and summoned Austin to appear and give evidence, and for his pay and expenses as a witness, he sued Brown. And judgment finally for Brown, for he acted as a *public agent*, and contracted for another, the government, and so not *personally* liable. Also Austin well knew in what manner Brown acted.

§ 11. It is a general rule that the declaration in these cases need not state the promise was in writing; but the promise in writing must be in evidence. But the declaration must state a consideration for the deft's. guaranty of another's debt. 4 Johns. R. 280; *Baily & al. v. Freeman*.

§ 12. The general rule is, if the person for whose use the goods are furnished be liable at all, as a real debtor for them, then he contracts a debt, and any other promise by a *third* person to pay that debt, is in its nature collateral, and must be in writing, or it is void by the statute of frauds and perjuries: and generally the question is, what is the debt of another. Cited 1 Phil. Evid. 360; 8 Johns. R. 37.

§ 13. January 1785, the deft., Wharam, requested the plts. to supply one Couthard with groceries. The plts. did not know C., the deft. replied, if you do not know him you know me, and I will see you paid. The plts. sent goods to C., and made him debtor for them in their books. They applied to C. for payment, and then to the deft. Judgment for the deft.,

for the debt was C's. debt, and the deft's. promise was to answer the debt of another; the credit was not given to the deft. but to another, and to this other were the goods originally charged by the plts. There was no writing.

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§ 14. So where the deft. said to the plts., you must supply my mother-in-law with bread, and I will see you paid, the court held that this was the mother's debt, and so the deft's. promise to see it paid, was collateral, and void as not being in writing. Promise void to pay another's debt illegally arrested, &c.

Jones v. Cooper.
Cowp. 227.—
Roberts 209.
1 Phil. Evid.
361.—Willis
481.

§ 15. December 3, 1751, the deft. acknowledged thus, "received of Mr. Harris £19 on behalf of my grandson, which I promise to be accountable for, on demand, witness my hand, S. Huntbach." In an action of *assumpsit* for money lent and advanced, the court held, that this note was good evidence. 2. That it was an original contract, and not a collateral undertaking, for the grandson was a minor, and so not liable. In this case it will be observed that the deft's. contract was held to be original, not on account of the form of it, but of the minor's inability to contract. 2 Phil. Evid. 10.

1 Burr. 373,
Harris v.
Huntbach,
cited 2 Selw.
239, 240.—
1 Phil. Evid.
361.—1 Bos.
& P. 156.—
Ch. 170, a. 5,
s. 7.—2 Phil.
Evid. 9, 10.

§ 16. If two persons come to a shop, and one buys goods, the other, to gain him credit, promises the seller "if he do not pay you I will," this promise is collateral; but if he say "let him have the goods and I will be your pay-master," this is an original undertaking, and for himself, and need not be in writing. So, I will pay if A do not, is collateral. A was charged as the debtor, and the undertaking was before the delivery of the goods, and formerly this was deemed material.

Imp. M. P.
165.—Bul. N.
P. 276.
Jones v.
Cooper,
Cowp. 227.—
Roberts 209.

§ 17. If the deft. give A. D. a letter of credit to the plt., and thereupon the plt. trusts A. D., and he becomes indebted to the plt., he may have an action against the deft. to compel him to pay this debt of A. D. See several cases of guarantees, ch. 50, by the letter any one might trust A. D.

3 Cranch,
493, Lawra-
son v. Mason.

§ 18. But generally no action lies for the voluntary payment of another's debt, as *Exall v. Partridge*, ch. 9, a. 17. If A owe B a debt on judgment, B's agreeing to stay execution on it a reasonable time, is a good consideration for the promise of a third person to pay the debt, though not so as to A.

8 D. & E. 308.
Cowp. 139.

§ 19. A unlawfully arrested B for B's debt to him. C, a third person, promised to pay the debt of B to A, in consideration of A's releasing B out of custody. Held, C's promise was void; for where the arrest of a deft. is illegal and void, his discharge is no consideration for another's promise. But if the declaration state a just debt and arrest, by virtue of a writ duly issued out of such a court, it will be intended after verdict the arrest was legal, and so the ground of another promise, will be a discharge of him arrested. So to forbear to sue me on a void security is no consideration for another's

Willes 482,
Atkinson v.
Settree.

CH. 9. promise to pay the debt; and generally for another's promise to pay my debt to be valid, I must owe a just debt.

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1 Ld. Raym.
312, Taylor
v. Jones.

§ 20. A third person requested a soldier might have leave of absence; this was given accordingly, and the third person promised to bring him back to the captain in 10 days, or to pay a sum of money. Held, the third person was bound to perform, and the consideration was good. See *Roe v. Hough*.

1 Salk. 27.—
2 Ld. Raym.
1085.

§ 21. One good distinction is this; if the third person come in aid of another, so that either may be sued, his promise is collateral, and must be in writing; otherwise, if the whole credit is given to the third person. *Birkmyr v. Darnell*; see *Sturgis & al. v. Robbins*; *Schermerhorn v. Vanderbayden*; *Holly v. Rathbone*; *Leonard v. Vredenburg*; *Lawrason v. Mason & al.*

3 East 169,
Taylor v.
Higgins.—
8 Johns. R.
202, 206,
Cummings v.
Hackley.—
8 D. & E.
610.

§ 22. One who became surety for the debt. before his discharge as an insolvent debtor, was afterwards obliged to give a new bond for debt &c., in lieu of the old one. Held, he could not sue for money paid to his use, though the new bond was accepted as payment, and the old bond cancelled; for liability to pay for another, cannot give the same cause of action as actual payment on his account; the new bond was not money paid. See *Jones v. Brinly*, and *Nightingale v. Devisme*, *Child v. Mortley*.

4 Johns. R.
461, Stuby v.
Champlin.—
7 D. & E.
204.—5 Johns.
R. 176, 178,
Elmendorf v.
Tappan.

§ 23. A executed to the United States a bond with sureties for duties, and A was named in it as the importer of the goods, and B named in it surety, and paid the bond. Held, he might recover the amount of A, though a third person really owned the goods. But if three men be principals in a bond to pay duties, and a fourth their surety, and E paid the bond at the request of one of them, he may recover the amount of the three; but the surety is not liable, having no interest in the distillery; no money was paid to his use.

1 H. Bl. 90,
94, Jenkins
v. Tucker;
and see a. 15,
s. 4.

§ 24. *The plt. voluntarily pays the deft's. debt, how liable or not.* The deft. married the plt's. daughter, and went to Jamaica, leaving her in England, and in his absence she died. The plt. was at the expense of her funeral, suitable to her husband's rank and fortune, though without his knowledge. The plt. recovered for monies laid out, &c. But *quære* if the plt. could recover for monies he laid out, &c. after her death, to pay debts she contracted in her husband's absence, in a reasonable manner. And Lord Loughborough said, if goods of A be "distraigned by the commissioners of the land tax, if a neighbour should redeem the goods and pay the tax for the owner, he might maintain an action for the money against the owner." A sells goods to B; B unable to pay A transfers them to C; he promises to pay A for them; this is a new promise. 5 Taun. R. 450.

§ 25. *No writing necessary where a third person engages to pay an execution on a new consideration.* As where C had an execution against B, and A promised to pay C the amount of it, in consideration C discharged B, and in consideration B, the judgment debtor, delivered his household goods to A. A's engagement was original, and not within the statute of frauds, and it was founded on new considerations, the discharge of B and his said goods delivered to A.

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8 Johns. R.
376, 377,
Skelton v.
Brewster.—
10 Johns. R.
242.

§ 26. A covenant to pay another's debt is not within the statute of frauds, as it does not apply to writings under seal. A covenant of itself imports a consideration, as to all contracts under seal. And every promise to pay another's debt must be in writing, however good the consideration.

4 Johns. R.
416, 418,
Livingston v.
Tremper.—
4 Johns. R.
422.—

§ 27. One Dearborn was in prison for debt, and lodged in the debt's hands property sufficient to indemnify him; thereon the debt. procured the plt. to become Dearborn's bail; and promised, but not in writing, to save him harmless. Held, an *original*, and not a *collateral* promise of another's debt; so not within the statute of frauds; the statute applies only to promises made in relation to pre-existing debts of a third person. When the debt. promised there was no actual existing default of Dearborn, but the debt's. promise was to indemnify against his *future* default; this was not a case within the statute, and the debt. promised on property in his hands.

12 Mass. R.
297, Perley v.
Spring.

§ 28. So if the plt. lend a horse to A, on the debt's request, A is liable on the delivery, and the debt's. promise is *collateral*; this requesting the plt. to lend the horse is no more than requesting him to trust A with the horse. See Post. ch. 32.

Mawbray v.
Cunningham.
3 Salk. 15,
16, Bourk-
mire v. Dar-
nell.—6 Mod.
248, 251.

§ 29. A tradesman delivered goods to A at the request of, and on the credit of B, who says *before* the delivery "*I will be bound for the payment of the money as far as £800 or £1000.*" Held, B is not bound; for the credit is to A as well as B. A, the *son*, was debited in the plt's. books, and B, the *father*, gave no promise in writing.

1 H. Bl. Rep.
120, Ander-
son v. Hay-
man.
Cited 2 Selw.
736, 737.
Hob. 211,
212.

§ 30. In this case, the debt. gave the note sued, as attorney to one Low, a person *non compos*. Friend had no power to contract the debt so as to bind Low; Friend was sued as on *his own* note, and held to be liable, for whenever one undertakes to promise for another, and has no power so to do, it becomes his own promise, for a promise must be intended by the parties; the promisee confides in receiving one, and here there would be no promise, if the promisor did not bind himself, as he has no power to bind a third person; the same as to a submission to arbitration.

Mass. S. J.
Court, Essex,
Nov. 1790,
Lewis v.
Friend.
3 P. W. 278.

§ 31. A *parol* promise to pay *another's* debt, and also to do some other thing, is void by the statute, for the plt. cannot se-

Salk. 70.

7 T. R. 201,
Chater v.
Becket.—

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1 Mass. R.
166, Little v.
Weston.

parate the two parts of such a contract, and affirm one part to be valid and the other not. A's promise to return a soldier to his officer above.

§ 32. April 29, 1801, the deft. and Keith gave their note thus:—"For value received, I promise to pay Capt. Amos Rodgers or order, three hundred dollars in six months from date, with interest until paid as witness my hand.

"George Keith, jun.

"Ezra Weston, surety."

New Jersey,
1 Peanning 1.

A parol prom-
ise to pay an-
other's debt is
void.

See Hunt,
adm. v. Ad-
ams.

Weston alone was sued, Keith had been declared a bankrupt, and plea, that the deft. and Keith never promised, &c. It was urged, that Weston's undertaking was only *collateral*, and not joint, as alleged in the declaration. Sedgwick and Sewall thought it was *collateral*, Strong was of a different opinion. The plt. had leave to amend. Strong held it to be a joint note, and the word *I* as repeated before each name, and the word *surety* as used, as is often done, only for the surety's benefit. Quære, if his opinion was not right?

Wain v. War-
ters.—
April, 1804,
Court of
King's Bench.
—3 Johns. R.
210, but see
Ch. 50, s. 8.

§ 33. How far the *consideration*, in a written promise to pay the debt of another must be expressed in the writing; see ante, Consideration. In this case it was held, the *consideration* as well as the promise, must be in writing, or it is *nudum pactum*, and that no *parol* evidence can be given of the consideration. The authority of this case may well be doubted. See Hunt adm. v. Adams, ch. 11, a. 1, 14. where a different opinion is held, points considered, 4 Wheaton, 85 to 98, and many cases.

7 Mass. R.
301, Sturgis
& al. v. Rob-
bins.

§ 34. The deft., in writing, requested the plts. to trust one Davis, not exceeding \$500, to pay if he did not—how held?

ART. 21. *Certain promises raised by law, the principles whereon—and sundry cases—*seem to be like the Roman *quasi-contracts*. These obligations, *quasi-contracts* as well as contracts, appear in this law to have been different from obligations *ex delicto* and obligations *quasi ex delicto*, as our contracts expressed or implied, have been viewed as different from torts; hence the Roman emperor says, having treated *de obligationibus ex contractu et quasi ex contractu, sequitur ut de obligationibus ex maleficio, et quasi ex maleficio dispiciamus*. Jus. Inst. L. 4. T. 1, cites D. 47, T. 2; Cod. 6, T. 2; Jus. Inst. L. 3, T. 28, where one becomes liable to another's action, yet not *ex maleficio*.

§ 1. The law, founded in reason, presumes a man makes a promise where he ought to make one, for the law intends that every man engages to perform what his duty and justice require. As if I employ one to do my work, the law implies that I engage to pay him what it is worth, and he may have this action of *assumpsit* on a *quantum meruit*, and say therefor, I

promised to pay him as much as he reasonably deserved to have. So if I buy goods of one, and no price is set, he may have this action on a *quantum valebant*; and say I promised to pay him as much as they were worth.

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§ 2. So if I state with A our accounts, and I am found to owe him a balance, the law implies I engage to pay it, and he may have an action against me, and state that he and I *settled our accounts together*, (*insimul computasset*,) and I was found in arrear so much, and promised to pay that sum.

§ 3. The law also implies, that every one who undertakes any office, employment, trust, or duty, engages to perform it with integrity, skill, and diligence; and if he do not, the party injured is entitled to his special action on the case: as if a sheriff neglect to execute a writ sent to him, or wilfully makes a false return; or if he or his gaoler suffer one taken on mesne process to escape, he is liable to an action. See *Goodwin v. Gilbert*, Ch. 32, a. 4, 15.

§ 4. So if an attorney betrays his client's cause, or being retained, neglects to appear, he is liable to this special action on the case. The law also implies, that a common innkeeper engages to secure the goods of his guest in his inn; that a common carrier or bargemaster engages to answer for the goods he carries; that a common farrier engages to shoe a horse well, and without laming him; that a common taylor, or other workman, engages to do his work in a workmanlike manner, in which, if he fails, this action lies, and for reasonable damages.

§ 5. But if I employ one to transact any of these concerns, whose common profession and business it is not, the law implies no such general undertaking, but in order to charge him with damages, there must be a special agreement.

§ 6. Actions on notes, bills, bonds, and other contracts, for labour done, and goods sold, are so plain, that scarcely any more attention is necessary than to look at the forms, and see they are correct. However numerous and variant the actions of *assumpsit* appear to be, they are all reducible to a few simple principles whenever the consideration is sufficient.

§ 7. *When for the badness of the goods, &c, can the deft. reduce the plt's. price, or bring a cross action.* See *Everett v. Gray* above; held, to the cross action—but contra when the plt. sued a *quantum meruit* for work done and materials found; held, the deft., even without notice to the plt., might be allowed to prove that the work done was not worth so much as the plt. claimed, because badly done; the plt. objected, that if so, the deft. ought to bring his *cross* action. 2d. If it appear the plt. has been paid on account as much as the work was worth, he cannot recover. 3d. It seems the deft. may be allowed

7 East. 479,
Bastenr.
Butter.

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Art. 21.



At nisi prius.

14 Johns. R.
377, Grant v.
Button.

18 Johns. R.
302, Beecher
v. Vrooman.
—15 Johns.
R. 230, Sill
v. Rood.

Mason 437,
Miller v.
Smith.

13 Johns R.
56, Wilt v.
Ogden.

6 Bos. & P.
136, Templer
v. McLach-
lan.

the same defence where the contract is for work done at a *certain price*; at least, if he give notice to the plt. previous to such defence, that he may be prepared to meet it: and the difference taken was material, for where the plt. sues on *quantum meruit*, he must of course come prepared to prove the value; but when for an *agreed price*, only to prove the agreement, unless timely notified the inadequacy of the work will be disputed. A. D. 1794, in *Broom v. David*, cited 7 East. 480, the deft. was turned over to his cross action, in such a case of an *agreed price*, and no such *previous* notice given—*Cormack v. Gilles* likewise, with the further circumstance, the deft. had a warranty that the seeds sold to him were of the sorts and quality for which they were sold to him. Held by Buller J., he must sue on his warranty, but Lord Kenyon seems to have been of a different opinion, p. 481.

§ 8. Held, that in an action for the price of a chattel, the deft. may prove a *deceit* in the sale, that it was of no value, and so defeat the plt's. action; or if the defect merely lessen the value, the deft. may prove this to lessen the damages.

So if a note be given by the deft. for the price, he may show, under the general issue, deceit in the sale.

So if the plt. sue for goods sold, the deft. in mitigation of damages may shew, they were of a quality inferior to what the plt. represented them to be at the sale. If the plt's. goods are sold to the deft., and to be paid for in his labour, he, when sued for the goods, may, on the general issue, shew he was ready and offered to perform the labour, but was prevented by the plt.

§ 9. In *Beecher v. Vrooman*, *Sill v. Rood*, and *Miller v. Smith*, it seems the price must have been agreed and goods accepted by the defts. This seems to be the true ground, especially if previous notice be given that the bad quality of the goods, &c. will be shewn by the deft. in the plt's. action for the price, according to the English practice, where there is no warranty.

§ 10. In this case an attorney sued his bills, and held, his negligence in conducting the cause could not be given in evidence, unless very gross negligence, that deprived his client of all benefit. It will be noticed, Sir James Manfield, C. J. observed, that a plt. does not come prepared to prove any thing more than his bill, the business done, and is not in a situation to meet a charge of negligence. Heath J. differed this case from that of an express contract. Rooke, J. said he would in this case (*Templer, &c.*) have staid execution, if there had been a cross action for the negligence. In this case, as in *Everett v. Gray*, Ch. 62, a. 3. s. 4. no notice was previously given to the plt. that negligence, or defects in the gun-locks

would be insisted on by the defts. at the trial. A material circumstance besides, how could the plt's. bill of costs, in Temple's case, be a measure of damages the client was entitled to, by reason of his attorney's negligence?

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Art. 22.

§ 13. The plt. contracted to build a bridge for a *price agreed*, and did it so badly, that after it served the purpose intended a short time, it, from its bad construction, was carried away by a flood. Held, he could not recover on his contract, because he had not fulfilled it; nor on a *quantum meruit*, because the defts. had received no benefit from his labours. In Taft's case, it was said by the court, that Everett v. Gray had been questioned; if not law, it seems that cases of these descriptions may rest very well, in general, on the principles stated in Basten v. Butter.

14 Mass. R.
282, Taft v.
Montague.

ART. 22. *How express promises exclude implied ones or not, or the plt. may recover on his common counts or not.* § 1. The cases under this head are very numerous, so many of them only will be here noticed, as may be proper to illustrate the general principles on which these kinds of cases are decided. The leading principle has been above stated, laid down by Buller, who observed, the law raises an implied promise, "because there is no security given by the party, but if the party choose to take security, there is no occasion for the law to raise a promise; promises in law only exist where there are no express stipulations between the parties." This rule is without exception, that is, while the *express* or *special* promise remains *in force*, and the promisee can recover on it, he must abide by it. But often the express promise fails him, as never being valid, or put an end to, or has been so treated by the promisor, that the promise may view it as at an end. The true question then is, in every such case, does the special or express contract remain in force. As where A agreed with B, under seal to do certain work, and did part of it, and B prevented A from finishing it according to the sealed contract. Held, A could not recover on his *common count* a *quantum meruit*, for the part of the work actually done, but that he must sue B on the sealed instrument. Judgment below reversed; Preston, the plt. below cited, Towers v. Barrett, 1 D. & E. 133.—Giles v. Edwards, 7 D. & E. 181.—1 Powell on Contracts 417. But the Supreme Court of the United States held the contractee had a clear right of action on his special contract, and that "whenever a man *may* have an action on a sealed instrument, he is bound to resort to it," and as it was in part performed, it could not be viewed as rescinded, for reasons which will appear. See 1 Dallas 428.—1 Caines' R. 47, 48.

Where bills, notes, checks, &c. are evidence on the common counts. See Ch. 20, a. 20, 21.—2 D. & E. 106, Toussaint v. Martinet. Where no privacy is necessary. See Ch. 9, a. 2. Cases, Ch. 62, a. 43.

4 Cranch R. 239, Young v. Preston, in error.

Ch. 4, s. 15.

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—3 Johns. R.
606, 511,
Howes v.
Baker.
4 Mass. R.
448, 449,
Worthen v.
Stevens.

3 East. 72,
86, Buckler
v. Buttivant.
2 Taunt. 145,
183.

2 Mass. R.
416, Whipple
v. Dow & ux.

7 Mass. R.
107, Whiting
v. Sullivan.

4 Bos. & P.
351, Cooke
v. Manstone.
The deft. re-
lied on Tow-
ers v. Barrett,
Weston v.
Downes,
Giles v. Ed-
wards.

Mass. S. J.
Court, June
Term 1783,
Peirce v.
Follows.

The covenantee cannot have an action for money had and received, where a covenant respecting lands is executed by a deed given, though it appear he has paid too much, as for more acres than were conveyed to him, was none but *parol* evidence.

§ 2. Held, "it is a general rule, when the parties have made an *express* contract, the law will not imply a contract." How far this rule will apply when the express contract is of such a nature, that no remedy will lie for the breach of it, when at the same time there is a sufficient consideration to support an *implied* contract, may be a question." In this case held the parties were bound by their *express* contract, and then the law will not raise an implied contract. 7 D. & E. 584. It is stated by Sugden, "that a contract cannot arise by implication of law under circumstances, the occurrence of which neither of the parties ever had in their contemplation.

§ 3. But where the daughter, when she came of age, annulled her *special* contract for board with her mother; held, she could maintain her action for it on an *implied* promise, considered by the court as never having been suspended.

§ 4. In this case the same general principle was adopted, it was *assumpsit* for keeping the deft's. horse, and decided, that the law will not imply an *assumpsit*, where there is an *express* promise. 2. Nor will the law imply a promise against the express declarations of the party, made at the time of the supposed implied promise, "for such declaration is repugnant to any implication of a promise." The deft. returned the horse to the plt. he had purchased of him conditionally, and if absolutely, yet the deft's. expressly declaring by his agent, he would have no more to do with the horse, when he returned him to the plt., fully negatived any implied promise to pay for his keeping.

Assumpsit on an agreement to deliver *soil* or *breeze*, also a count for money had and received. Evidence, the deft. had agreed to deliver *soil* only, the plt. paid £2 5s. as earnest, and the deft. refused to deliver the *soil*; held, the plt. could not recover damages for the non-delivery on the first count, for the *variance* between the contract laid and the one proved, nor the £2 5s., money had and received on the second count, because *the agreement was still in force*, and the plt. had a remedy on it—it was not *rescinded* by any act of the parties, but only *broken* by the deft. The plt. relied on *Harris v. Oke*, Bul. N. P. 139.—*Payne v. Bacomb*, Dougl. 651, cited *Hunt v. Silk*, 5 East. 449.

§ 5. The general principle was adhered to in this case, and because the deft. proved a special contract for the plt. to labour by the day at a fixed price, the court held he could not

recover on any implied promise; the special contract *remaining in force*, if not performed.

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§ 6. Held, a contract cannot be rescinded by one party for the default of the other, unless both can be put in *statu quo* as before the contract, and this could not be after the contractee had had an immediate possession of the house, the contractor stipulated to lease, and possession of it under the agreement only, *Giles v. Edwards*, cited. The leading principle is in this case.

5 East 449,
Hunt v. Silk.

§ 7. *Assumpsit* to recover \$20 69 for the labour of the plt's. son. 1. Count was on a special agreement. 2. General *indebitatus assumpsit*. 3. *Quantum meruit*. The evidence proved an express contract to work seven months for \$53, and in proportion if either party dislike. Held, the evidence did not support the first count; as it did not prove the special contract declared on, but also held the plt. might recover on his general count, and observed, this was the *new* practice, and not the former, and that a recovery on the general count would be a bar to an action on the special agreement. This decision may be questioned, for here a special agreement existed, and it seems *remained in force*, and was proved, though not the one alleged in the declaration, and when the court said, that a recovery on this general count would be a bar to an action on the special agreement, it implied the court thought it existed, and not put an end to; nor do the cases cited justify the decision, one cited, *Harris v. Oke*, Bul. N. P. 139, 140; for in this case, though the plt. laid a special agreement, *he proved none*, nor did it appear one ever existed, and then no doubt the plt. might prove his common count, the implied promise, as this cannot be excluded by a *special contract* when there is no evidence one ever existed. As to *laying* a special contract it is but allegation, and an attempt to prove one is nothing, if none be proved; it is the one proved to have been made and not rescinded, which excludes the contract implied by law. Another case cited is *Weaver v. Burroughs*. This only proves, that if a *special agreement appears*, though not such a one as is laid in the plt's. declaration, he cannot recover on his general count, in its nature a *quantum meruit*. A third case cited is found in Dougl. 651. This is exactly to my point; in this case the plt. stated a *special agreement* and *failed to prove it*; nor does it appear he proved, or that it appeared any special agreement ever existed. Here the court did right to permit the plt. to prove his *general count*, as it did not appear to be excluded by any *express* contract. *Kech's case* A. D. 1744, Bul. N. P. 139.

5 Mass. R.
391, *Keyes*,
in error v.
Stone, A. D.
1809.

Harris v.
Oke.

Bul. N. P.
139, *Weaver*
v. Burroughs.
—Sra. 648,
Payne v. Ba-
comb.

The plt. declared on a *special written agreement*, by which the plt. was to deliver certain logs, &c. to the deft., and by

10 Johns. R.
36, 38, *Lin-*
ningdale v.
Livingston.

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which he promised to pay a certain sum. The plt. averred he did perform &c., and that the deft. did not pay. 2. Counts on a *parol* agreement of the same import; and 3, the common counts for goods sold and delivered, money paid &c., plea *non assumpsit* with notice of set-off. At the trial the plt. waived the *special* agreement and went on the *common* count &c., the court held he might. Also held, if the plt.'s. evidence be sufficient to prove his general count, supposing he had not declared on a *special agreement*, he may recover on that count, no doubt, if he had a right to waive the special agreement and *not to attempt to prove it*. Likewise held, the deft. might give it in evidence to lessen the damages, it was not then a nullity. Also held, if he offered to defeat the plt.'s. action by showing he failed to perform, it is immaterial, and may be rejected. The plt. failed in part to perform, but he delivered the logs, though too late, to the deft., which he used and so accepted. This case need not be disputed, because the court held the plt. proved, "that the *special agreement* was no longer subsisting and in force, but had been *put an end to* by the refusal of the deft. to permit the logs to be laid, and by appropriating them to his own use;" this gave the plt. a right so to waive. The court cited *Cooke v. Munstone*, also Bul. N. P. 139 above, and *Tuttle v. Mayo*, 7 Johns. R. 132. The court further observed on the case in Buller, that it admitted the rule now is, that if there be a *special agreement*, and the work be done, but not in pursuance of it, the plt. may recover on a *quantum meruit*. The plt. may recover on a *quantum meruit*, no doubt, if the deft. *accept* the work so done; because the parties then make a *new* case, one not within the agreement, *both* waive it; and the plt. must thus recover on his *new* case, for the work done not as agreed, but yet accepted by the deft. But if the special agreement in *Liningdale v. Livingston* was "at an end" and no longer subsisting in force, on what principle was the deft. allowed to use it to lessen the damages? See s. 14.

Tuttle v.
Mayo.

7 Johns. R.
132, Tuttle v.
Mayo.

The court relied on Sir James Mansfield's rule in *Cooke v. Munstone*. This rule is thus, "where a party declares on a special agreement, seeking to recover thereon, but *fails altogether*, he may recover on a general count, if the case be such, that supposing there had been no special contract, he might still have recovered." The court in *Tuttle v. Mayo* said, "the plt. failed wholly to make out a special agreement," that is, failed to prove any such existed. This case need not be disputed, nor *Cooke v. Munstone*, wherein it was held the plt. could not recover on his general count, because the *special agreement was still in force*; nor on his special agreement

because his evidence did not prove it to be as he had laid it in his declaration : certainly good law in both points.

§ 8. So in this case (stated more at large in another place) the court held, that if parties make a contract with *one intent*, as to constitute the relation of master and apprentice &c. and the same be defective to that purpose, it never can be applied to *another intent*, as to constitute the relation of hirer and hired for a year &c. ; for to give it the other intent or construction, is to make it mean what the parties never intended. So when the parties deliberately make a *special* contract by which to measure their right and payments, he that claims in the case must abide by it unless rescinded, or a new contract arises on their mutual conduct.

§ 9. Innocent endorsee of a note may recover against the maker on the *common* count, the endorsement being forged. As where Gore and Grafton were partners in trade, and Grafton made a note to one Cushing as payee, without his knowledge, or that of Gore ; then Grafton *forged* Cushing's endorsement on the note, and caused it to be sold in the market, by an innocent broker, and the plt. purchased it at one per cent. a month discount. He recovered the amount of the makers, the debts. on the common count for money had and received. As Cushing had no knowledge of the note, there was no assent on his part, and of course there was no contract between him and them ; he paid no consideration, therefore the note was a nullity, as between the original parties, and as between the makers and the plt., as there was only a forged endorsement, the plt. paid or advanced his money to them, not on any special valid contract, as there was none, and for no consideration, but they obtained it by the fraud and forgery of one of them. The defence was, 1. That here was a felony that merged the note, through which no right could be claimed. But the C. Justice in delivering the opinion of the court said, here was no forfeiture of estate for such a felony, and the reasons of the common law did not apply, and further the plt. did not claim through the note. 2. Also an objection, here was a special contract, but clearly there was none of any validity, on which the plt. could recover, then his case came within the rules before stated in this article. Dougl. 637, Archer v. Bank of England ; Bul. N. P. 130 ; 4 D. & E. 485, Irving v. Wilson, & al. ; 7 East 210, Swan & al. v. Steal & al. ; Cowp. 814, Wellet v. Chamber ; Dougl. 228 ; 5 D. & E. 601 ; 1 H. Bl. 313, Collis v. Emmett & al. ; 3 Burr. 1516, Grant v. Vaughan ; 3 D. & E. 174, Tatlock v. Harris ; 12 Mass. 172 ; 6 Johns, 11.

§ 10. A similar case, the Manufacturers and Mechanics Bank v. Gore and Grafton. Sundry cases in which the plt.

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8 D. & E.
379, Rex v.
Laindon.
Ch. 93, a. 2,
3, 4, 5.

15 Mass. R.
331, Board-
man v. Gore
& Grafton ;
as to this for-
gery were ci-
ted 4 D. & E.
30, 332 ; Ch.
213, a. 2, s.
4.—3 D. & E.
178.—1 H.
Bl. 569.—
Style 346.—
See Rol. Abr.
Trespass 30.—
Bac. Abr. Ac-
tions on the
case K.

As to paying
on a forged
bill &c.

15 Mass. R.
75.—M. & M.
Bank v. Gore,
& al.

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has recovered on the common counts, monies in lieu of counterfeit monies paid him, not received by him at his risk ; Ch. 170, a. 5, s. 7, as to tenders &c. In the above bank case, the court went on this principle, to wit : If A propose to borrow money of me, on good security proposed and described, to be repaid in 90 days, and I lend him the money, and receive of him security, apparently such as he proposed, as for instance his and B's note endorsed, to appearance, by C, and it is found the security is bad, as that the endorsement is *forged*, for instance, I may view the note as waste paper and disaffirm it, and sue A and B immediately, and within the 90 days, for money had and received. In which case I do not claim through or under the note, but for monies advanced to them, obtained by fraud, and on a security worth nothing, and which I may treat as a nullity. So are many and all the cases on the point.

§ 11. In this, as in Boardman's case above, there was a question, whether the partnership contract authorized Grafton to raise monies for the general partnership, in such a *criminal* manner, and thereby bind his partner Gore, unless proved, as in the bank case it was, or fairly presumed, Gore and Grafton received the plt's. monies to their use. As to this new and nice question, Boardman's case seems to be left in some obscurity, though in the main rightly decided. He properly rejected the note, the express contract, as a nullity imposed on him by fraud and forgery, and resorted to his common count, the implied contract ; on this Gore must have been deemed liable, either because the plt's. monies came to the firm's, so to Gore's use, this is left doubtful ; or because Gore in some way authorised or trusted Grafton to get the plt's. monies as he did. If any such trust or authority, it clearly resulted from the *partnership*, which for any thing that appears, was *general and in common form*. If an honest man and a rogue are partners, in such form, and the honest one knows not but the other is honest, how does such a partnership authorise the rogue to do what Grafton did in this case, so as to make the honest one liable on implied contract, is a question not settled in the books, and but rarely found made in them. But in cases of torts, in subsequent chapters, we shall find the liability well settled, of one who trusts or employs another to act for him.

§ 12. Lord Mansfield (Bul. N. P. 139,) spoke of a new practice, to allow the plt. to go upon his common count where by the former practice he could not. And Parsons, C. J. in *Keyes v. Stone*, observed, that " the opinion of the court below was formerly holden to be law," and referred to *Weaver v. Boroughs*, as an authority, which law held the plt. to his special contract while in force ; then observed, Lord Mansfield

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Oke.

overruled this practice in the year 1759, in *Harris v. Oke* ; that in 1781, in *Payne v. Bacomb* ; Ashurst J. adhered to the old rule and directed a non-suit, but it was set aside, and Parsons approved what he called the *new* practice. Thus this old practice is admitted, and now the true question is, has there been any change in the law in this respect ; clearly none in principle, and as this subject is important and has been loosely considered, the inquiry ought to be pursued.

§ 13. *The rule still is, the plt. must go on his special contract while it remains in force, not varied by mutual consent.* I shall now shew that this is, and always has been the law, by abridging and stating all the principal authorities. I begin with referring to the cases above. In *Young v. Preston*, in error, the court held the contractee to his special contract, though he was prevented finishing his work by the contractor, whereby he *broke* his contract, and subjected himself to an action on it, but he did not rescind it, a distinction carefully to be attended to ; further held, whenever one can have an action on a sealed contract, he must resort to it. *Howes v. Barker*, where the law requires a written promise, it raises no implied one. *Worthen v. Stevens*, s. 2, the true principle is stated as far as it goes ; the same 3 East 75 to 85, and 7 D. & E. 584, cited s. 2. *Whipple v. Dow & ux.* s. 3, there never was a valid special contract, so the implied one was never suspended. *Whiting v. Sullivan*, s. 4, the true principle again stated, and added, the law will not imply a party's promise against his express declarations. *Cooke v. Munstone*, s. 4, all the old true principles were adopted, though, as in the other cases cited, long before 1759 and 1781. *Pierce v. Fellows*, s. 5, the true principle again stated in Massachusetts A. D. 1783. *Hunt v. Silk*, s. 6, contains a principle not disputed. *Keyes v. Stone*, s. 7, already commented upon. *Weaver v. Burroughs*, s. 7, admitted to have been decided on the old law. *Harris v. Oke*, s. 7, no proof a special contract was made, so not to the purpose ; the same *Payne v. Bacomb*, s. 7. 12 Geo. 1.

§ 14. This case is fully stated Ch. 36, s. 19. It is said, if the plt. prove a special agreement, and the work done, *not pursuant to it*, he shall recover on the *quantum meruit*, otherwise he will not recover at all. In this case (an old one) evidently a fact existed not stated ; that is the def't's acceptance of the plt's work done, not according to his special contract ; this is clear ; for if A contract to build me a brick house for \$5,000, of certain dimensions, and he builds a wooden one, clearly he cannot recover on his special contract, for he has, in no part, performed it ; and clearly not for the wooden house, if I reject it, and in no sense accept or admit it ; but if, by my conduct, I, any way, expressly or impliedly, accept the

Bul. N. P.
134, Koch's
case A. D.
1744.

CH. 9. wooden house, or approve his building it, he will recover for
 Art. 22. it on his *quantum meruit*; because it being *dehors* the special agreement about a brick house, this agreement does not apply, but is varied or deviated from by mutual consent, and there results, on my part, an implied contract to pay for his work on the wooden house a reasonable sum, by my expressly or impliedly admitting it. In fact, he and I give rise to a new and distinct contract, this case explains the last part of my rule, s. 13. *Linningdale v. Livingston*, s. 7, rested on the same ground rightly understood; the plt. and deft. both broke the special agreement, and months after the plt., by it, was to deliver the logs, he delivered them, or most of them in fact, and the deft. accepted and used them; then as above, resulted the implied promise on the new case; the error was in admitting the old agreement to regulate the price in this new case. *Tuttle v. Mayo*, s. 7, is there well explained. *Rex v. Laindon*, s. 8, the same. So *Boardman v. Gore and Grafton*, and the *M. & M. Bank v. same*, have been sufficiently stated already; s. 9, 10, 11, and the cases therein cited.

§ 15. *Gibson & al. v. Minet & al.* in error, 1 H. Bl. 569 to 625, A. D. 1791; in the House of Lords, see Ch. 20, a. 21, s. 21; *Archer v. Bank of England*, Ch. 20, a. 6, s. 2, there stated; see *Irving v. Wilson*, ch. 9, a. 7, s. 2; *Swan v. Steal*, Ch. 52, a. 2, s. 15; *Willet v. Chamber*, Ch. 52, a. 2, s. 3; *Smith & al. v. Jameson*, Ch. 9, a. 2; *Collis v. Emett*, Ch. 20, a. 13, s. 3; *Tatlock v. Harris*, Ch. 20, a. 14, s. 2; these cases relate to the principles in *Boardman's* case above.

§ 16. This subject ought to be examined still further, and the cases still later noticed, because any loose rules evidently give the plt., one party only, very undue advantages, as they very often will give him an election to go on the express contract or the implied one, as he sees will best suit his purpose, a consideration of far more importance than some inconveniences in strict practice.

2 Phillips' Evid. 83, cites Bos. & P. 351, 355, *Cooke v. Munstone*.—3 Taun. 52.—2 East. 145, *Hulle v. Heightman*, stated at large, Ch. 57, a. 2, s. 26; and some *ni si prius* cases 451.

Phillips, one of the latest writers on the law of evidence, has an express article, "evidence in *assumpsit* on the common counts." He does not notice any such *new* practice, as is mentioned in *Keyes v. Stone*, nor does his American editor, Mr. Dunlap. Phillips proceeds on the principles of *Cooke v. Munstone*, stated above, this art. s. 4; the principles stated thus, "where a party declares on a special contract, seeking to recover thereon, but fails altogether in his right so to do, he may have recourse to a general count, if the case be such that supposing there had been no special contract, he might still have recovered for money paid, or for work and labor done; thus in the case of a plt. suing a deft., as having built a house for him according to agreement, if he fail to prove that he has

built a house according to agreement, he may still recover for his work and labour." This last part is Kech's case properly explained as above, s. 14. Phillips adds, if the special contract be not rescinded, but remains operative, the plt. cannot recover on his general count, if he fail to prove his special contract; then speaks of special contracts altered by mutual consent, and the work, as within the first contract, is paid for by it, and as far as not within, on a *quantum meruit*. So is the law; so was the old law, and these principles are too sound to admit of any others. And the rescinding, says Phillips, of the contract must be *in toto*, so that the parties may be restored to the same situation in which they were before placed.

§ 17. The law thus stated by Phillips, Mr. Dunlap approved, except where the deft. defeats the *special* agreement by his act, as if he put an end to it, or prevents the plt's. performance of it, then he may resort to his common count; nothing seen in Phillips' text or the English cases, to the contrary; all agree if the deft. defeat by his acts the special contract, he has no right to hold the plt. to it, but leaves him at liberty to depart from it, and to resort to the implied promise. Mr. Dunlap refers to Linningdale v. Livingston, Champ-lin v. Butler; Stra. 648, Weaver v. Burroughs; 2 D. & E. 105, Toussaint v. Martinent, all stated above; also cites 12 Johns. R. 374; 13 do. 94, 56, 359; 3 do. 439; 6 Taunt. 322; and states the case 12 Johns. R. 374, Raymond & al. v. Bearnard, thus; "so where part of the purchase money for goods the plt. had agreed to call for, and take away within a certain time, was paid in advance, and he did not call within the time, but some time after its expiration demanded them, and the deft. refused to deliver them; held, the plt. was entitled to recover back the money paid in advance." Here the plt., by his own negligence, defeated the special agreement so far as to lose the benefit of it. This case may have been decided on a mere equitable view of it, as that the deft. ought not to keep the goods and advance-money both. If this was *earnest* meant to be forfeited, the decision was wrong. If decided on any principles of contracts, it was because the parties, by their acts rescinded the agreement, the plt. by his negligence, and the deft. by his refusal. But as to rescinding contracts, see the whole of chapter 122; also Ch. 51, a. 1, s. 9, &c.; Ch. 133, a. 8, s. 8; Ch. 32, a. 13; Ch. 139, a. 5, a. 7; Ch. 171, a. 4, s. 16, a. 13, s. 17. Mr. Dunlap also states the case of Penoyer & al. v. Hallet, 15 Johns. R. 332, where as in the common case, the performance of the whole voyage is a condition *precedent* to the payment of any freight.

§ 18. From all which it appears if the parties make a proper special contract, and all perform, no suit is necessary;

CH. 9.

Art. 23.

Also so is 14 Johns. R. 320, Clarke v. Smith, and 18 Johns. R. 169, Champ-lin v. Butler, and Ch. 32, s. 31, cites Hunt v. Silk, above, s. 4, 6.

Raymond & al. v. Bearnard.

CH. 9. hence there must be a breach of it to give rise to a suit. Then,
 Art. 22. 1st, if the plt. perform his part and the deft. neglect his, the
 plt. (suing in time,) of course has his action on it, and on this
 only. 2. If the plt. do not perform his part, he has no suit ; if
 in part, none, unless that in some way be accepted ; if a part
 and something else, his remedies, if any, are two. As if A
 agree to build me a house for \$5,000, and a barn for \$1,000,
 one entire contract ; he does neither, he has no action. If
 he build the house only, he has no action, unless the jury can
 find I accepted it, as part performance gives him a right but
 by my assent to it ; and if I any way assent to it, his right is
 the \$5,000. If he build the house, and instead of the barn,
 a fence, the case of the house is as last stated ; as to the fence
 he has no claim, unless I accept it expressly or impliedly ; if I
 accept it, the case of the fence comes within Kech's case, as
 stated s. 14. 3. If the deft. by rescinding the special con-
 tract, or otherwise hinder the plt's. remedy on it, he then may
 resort to an *implied* promise, and go on his common counts, for
 the law will imply that if I prevent the special contract being
 sued, I submit to the justice and equity the law intends and
 implies.

10 Mass. R.
 230, 350,
 Richards v.
 Killam.

§ 19. *Assumpsit* will not lie for a fraudulent assignment under seal of a bond, though the bond be forged. The assignment containing special covenants as to the recovery of the money supposed to be due on the bond assigned, this action was on an implied promise on the deft's. part, that said bond was genuine. The party makes a written or verbal promise, or the law implies one. To state every sufficient consideration must be an endless and a useless undertaking. In thousands of different forms of declarations in the books, sufficient if true to maintain the action, this sufficient consideration is expressed and appears. This consideration is better understood by attending to a few principles, than by running through all the numerous cases ; this has been done in a former chapter. Most of the considerations in *assumpsit* appear in these forms of expression, and the same also shew the right of action.

§ 20. First, in consideration the plt. sold to the deft. at his request the goods described in the declaration, or in a schedule annexed, he promised to pay the plt. as much money, as they were reasonably worth at the time of the sale and delivery.

§ 21. Second, in consideration the plt. laboured or permitted his minor son, apprentice, servant, or hired man to labour for the deft., in some work or business described in the declaration or schedule annexed, he promised to pay the plt. as much money as he deserved to have therefor

§ 22. Third, in consideration the plt. permitted the deft., at his request, to use and enjoy, for such a time, such the

plt's. property described in the declaration or schedule annexed, he the deft. promised the plt. to pay him as much money as he deserved to have therefor. In such case the promise is to pay on demand, where no time of payment is specially agreed upon.

CH. 10.

Art. 1.

§ 23. If the plt. let the deft. have at his request, any kind of property of use or value to either; or do for him any labour as a physician, attorney, &c.; or allow him to use or enjoy any of the plt's. property, as his house, store, wharf, vessel, &c.; an action lies for payment, either for the price agreed on, or for a reasonable sum.

§ 24. There are, however, some cases in *assumpsit* besides those stated in former chapters, in which questions arise, if the plt. can maintain an action. These will be noticed in the following chapters, the grounds of a sufficient consideration having been examined.

§ 25. If the heir promise the father, intending to cut down timber to raise his daughter's portion, to pay so much for her portion, if he will not cut it, she may have *assumpsit* against the heir for the sum promised. In this case the consideration or motive influencing the son to promise is good, to save the timber on the estate coming to him, he is moved to promise to pay his sister a certain portion. The father is to be considered in two points of view. 1. As the owner of the estate, and as having a power and right to take off the timber to raise his daughter's portion. 2. As acting for his daughter and in her behalf, and taking a promise to pay her her portion, giving her a right to sue for it.

1 Vent. 318,
333.—1 Com.
D. 197.—
2 Lev. 211.

§ 26. A case in which the law raises no promise for meritorious services done, as where A worked for a committee who had resolved, "that any service to be rendered by him should be taken into consideration, and such remuneration made as should be deemed right." Held, A could have no action for such work, as the resolution imported the committee was to judge if any remuneration was due. 1 Maule & Sel. R. 290, 291.

CHAPTER X.

ACTION OF ASSUMPSIT. AGISTMENT.

ART. 1. *Agistment*. The plt. brings this action against the deft. for agisting, feeding, keeping, and depasturing the deft's. cattle. The action may be *indebitatus assumpsit*, or *quantum meruit*.

Imp. M. P.
308, 309.—
1 Bac. Abr.
243.

CH. 10.
ART. 2.



Moore 543.
—Imp. M. P.
307.—8 Co.
63, Caly's
case.—Bul.
N. P. 46.

Cro. Car. 271,
Chapman v.
Allen.—Imp.
308.—Jones
128, 129, 131,
2 Esp. 346.

Imp. M. P.
307.

Chapman v.
Allen, Cro.
Car. 271.

—Jones 280.

§ 1. If A take a horse to pasture and he be *stolen*, no action lies against him, unless he make a special promise to deliver him ; for he undertakes to feed him in the fields, and not to keep him safely, as the hostler is obliged to do, in his stable.

§ 2. And he who takes beasts to feed in his pasture, cannot retain till he is paid their keeping. He has no *lien*, unless it be so expressly provided for, and if lost for want of *ordinary* care, he must be liable to an action for them. As the law lays him under no particular obligation to preserve the creatures, in his *pasture* by the owner's consent, on the one hand, so it gives him no lien or special advantage to retain for his pay, on the other. And as to bailment he is on the ground of a common bailee.

§ 3. In agistment, various kind of creatures, as horses, sheep, horned cattle &c. for various periods of time may be taken in, by the season, the month, the week, or the day, by the head, by the pair, by the dozen, score, &c. It is called *agistment*, because the cattle are suffered to be *agiser*, that is, to be *levant and couchant* on the land—and large tracts of land are often profitably employed in this way.

§ 4. Whenever one takes in creatures to pasture, he takes them on an implied promise to return them on demand to the owner.

§ 5. It is a good declaration in this action, to allege, the deft. is indebted to the plt. in £10 *for the feeding and agistment of beasts* ; for though it is not sufficient to allege generally, he was indebted, for this may be for rent upon *leases*, or debts upon specialties, yet this is certain enough, for the declaration states it to be for *pasturing*, a matter for which assumpsit will lie.

§ 6. Agistment in England, especially in ancient times, was much connected with the forest laws, as a very considerable portion of it was in the forests ; but there has been nothing of this in the United States. Anciently there was an officer, called the agistor, whose business it was to present trespasses by beasts in the forest, and if he presented any that did not belong to his office, he was fined.

§ 7. When, many years since, a chapter was allotted to this subject of agistment, or pasturing various kinds of creatures, there were existing many statutes in the several States on it, and it was expected that in the course of a number of years many decisions would be made on them ; but it has so happened that no American decisions deserving any notice, have been found on the subject. The numerous English cases growing out of the tithe system are of no use in the United States.

ART. 2. *Agistment on Mass. statutes.* Though there never

has been in the United States any kind of *agistment*, or feeding of cattle in forests under divers regulations, as there has been in England, yet in some of the states, and especially in Massachusetts, there long has been a species of agistment, or feeding of horses, sheep, and horned cattle, in the roads and highways, regulated by statute law, and also on commons.

CH. 10.
Art. 2.

§ 2. In the Colony of Massachusetts there was a law to prevent sheep feeding on the commons without a shepherd, for a part of the year. In 1693, this law was revised, and it was enacted, that for every sheep in every town going on the commons without a shepherd from May 1 to Nov. 1, yearly, the owner or keeper should pay a fine of 3*d*. This law was revised Feb. 13, 1789.

Province
Act, A. D.
1693.

§ 3. By an act passed in the Province of Massachusetts Bay, in 1698, it was provided, that neat cattle, horses, or sheep, going upon the commons, not allowed to feed there by the major part of the proprietors empowered to permit the same, might be impounded in the manner pointed out in the act.

Province
Act, A. D.
1698.

§ 4. By this act all horse kind of a year old going at large on the common or ways in any town, are to be sufficiently fettered, on penalty of fifty cents, from April 15 to Nov. 1; but power is given to towns at their annual meetings in March or April, by vote to grant liberty for horses to go at large without fetters, between the said fifteenth day of April and the first day of Nov. yearly. This act, by another passed June 22, 1793, is extended to asses and mules.

Mass. Act,
Feb. 3, 1789.

Mass. Act,
June 22,
1793.

§ 5. By this act, field drivers are empowered to take up and impound any swine unyoked or unringed, horses unfettered, sheep not under the care of a shepherd, or going at large on the common or highways, between the fifteenth day of April and the first day of November, yearly, and to proceed with them in the manner pointed out in the act.

Mass. Act
of Feb. 14,
1789.

§ 6. By this act each town may direct, that neat cattle, horses, or horse kind, mules, or asses, shall not go at large, on penalty of twenty-five cents for each beast, at any one time, to be recovered by impounding, by any inhabitant of the town.

Mass. Act,
Feb. 26,
1800.

§ 7. By this act, towns are empowered to direct, that any particular description of neat cattle, or other commonable beasts, shall not go at large without a keeper; and the owners of beasts thus going at large against law, and doing damage, are made liable to make satisfaction therefor, in lands of others, "whether such improved lands be inclosed with a sufficient fence or not." Laws in substance like these are, or probably will be, found necessary in each State

Mass. Act,
Nov. 21,
1804.

CH. 11.

Art. 2.



CHAPTER XI.

ASSUMPSIT. AGREEMENT WRITTEN, HOW REQUIRED OR NOT.

Pl. Com. 17.
—Hob. 79,
Palmer v.
Pope.

ART. 1. *Agreements what.* This is *aggregatio mentium*, when two or more minds are united in a thing done, or to be done; and it ought to be so certain and complete, that each party may have an action upon it; and there must be *quid pro quo*.

§ 1. An agreement ceases by being put in writing under seal; but not when put in writing for a *memorandum*.

Cooper's Pl.
182.—
4 Wheaton
225, 230.

§ 2. A promise accepted becomes an agreement, for the minds of the parties unite in the thing—but essential to agree the price and the very terms.

§ 3. An agreement shall always be expounded according to the intention of the parties, and have a fair construction.

3 T. R. 524,
Curry v.
Edensor.

§ 4. Hence, a *broker*, when he bought goods for his *principal*, agreed for half per cent. to indemnify him from any loss on the resale; the principal had a fair opportunity to sell to advantage, but neglected, and afterwards was obliged to sell at a loss; it was held, that the broker's promise was discharged, and no action lay against him.

See Coke v.
Oxley, Ch.
22, a. 22.

Hob. 41, 42,
Cowper v.
Andrews.—
1 Com. D.
402.

§ 5. *Agreement when void.* If one agree for goods at such a price, the bargain is void, and no action lies, if the price be not immediately paid, or a future day of payment agreed on. But if the seller deliver the goods without either, the agreement is good. So without either, if the vendee *afterwards* pay, for this payment has relation to the first agreement.

See Ch. 16,
a. 2.

ART. 2. *Earnest.* So if the price be agreed, and the vendee pay *part*, as *earnest*, the contract is perfected, and an action lies on it; and the same if a pay-day be fixed upon.

Salk. 113.—
6 Mod. 162.
—Langfort v.
Tiler, 1 Esp.
15—2 Bl.
Com. Chris.
Notes 57, 58.
—12 Mod.
345.

§ 1. The effect of paying *earnest*. Earnest only binds the bargain, and gives the party a right to demand; as where the deft. bought four tubs of tea of the plt., paid for one and took it away; and left £50 in *earnest* for the others there: Holt, C. J. ruled, that though *earnest* was paid, the money must be paid on taking away the three tubs, as no other time of payment was appointed.

Ch. 80, a. 45.
—5 T. R.
409, Bach v.
Owen.—
1 Bro. C. C.
417.

§ 2. That *earnest* only bound the bargain, and gave the vendee a right to demand, but then a demand without payment was void. That after *earnest* paid, the vendor cannot sell the goods to another, without a default in the vendee. If the vendee do not pay and take away the goods, the vendor ought to request him. Then if he do not pay and take them in a *reasonable* time, the agreement is dissolved, and the vendor is at

liberty to sell them to another. [The United States courts will not enforce an agreement made in fraud of the laws of the United States.] Whatever sum is paid as *earnest*, is to be deemed *part of the price* when the goods come to be paid for. *Earnest*, therefore, is no more than an advance or payment, or a part of the price. 5 Co. 177.—2 Vern. 606.

§ 3. The deft. agreed to sell goods to the plt., who paid a certain sum as *earnest*, and the goods were packed in the plt.'s clothes, and left in the deft.'s store till the plt. should send for them; but the deft., at the same time, declared they should not be taken away till he was paid. The court held, this was no delivery to the plt., and vested no property in the goods in him; he had no right of action for them till paid for. If the vendee do not perform the bargain, the deposit is forfeited.

§ 4. If A agree to purchase plate of B, and he, to get A's arms engraved on it, and to pay for the engraving; the court held, that a delivery to the engraver for this purpose was no delivery to A, but that B might stop the plate in *transitu*, the price not being paid by A. See 2 Phil. Evid. 118.

§ 5. If A and B agree to exchange horses, and B pay A \$1 to bind the bargain, A may sue B for not delivering the horse, and need not allege his offer to deliver his own to B, for the payment of *earnest* vests the property of A's horse in B; but A must allege, (or it is bad on special demurrer) he specially demanded the horse of B, and that he did not deliver him.

§ 6. *Earnest*, or part payment for land purchased, according to the better opinion, does not amount to a part performance, so as to take the case out of the 11th section of the statute of frauds, in law or equity; for the legislature has said in the 17th section, that such earnest shall, as to goods, have the effect, but not in the 11th section as to lands. The cases are many, and sometimes contradictory, and it will be observed, that all the cases cited in this article respect *goods*. In support of the above position, are New. on Con. 187 to 191; Ch. R. 128, Symonds v. Cornelius; 7 Vesey 341; and Sea-good v. Meale, a. 8; 4 Vesey 720, Main v. Milbourne, and Sugden's Vendors &c. 88, 89.

§ 7. *Change of property without earnest paid, &c.* A, knowing B was insolvent, sold him goods for a promissory note at sixty days; the goods were left in A's possession, and no earnest paid; A shewed them as the goods of B; held, B's sale was good against one made by A, though B became insolvent, and the note remained unpaid.

§ 8. *An agreement void ab initio, cannot be subsequently affirmed by a new promise.* As where an insolvent gave his note, date blank, to his creditor, to induce him to sign a peti-

CH. 11
Art. 2.

3 Cranch.
242.
1 Saund. 319,
Portage v.
Cole.—
1 Esp. 15.—
2 H. Bl. 316,
Goodall v.
Skelton.—

1 Esp. 15.
7 T. R. 64.,
Owenson v.
Morse.—
2 Com. D.
135.

5 T. R. 409.
Back v.
Owen.

Contra,
1 Vern. 482.
—Ch. R. 16.
Voll v. Smith.
3 Atk. 1, La-
con v. Mer-
tins.

2 Ch. Ca. 135,
Owen v. Da-
vies.—
2 Calnes' R.
38, Hunn &
al. v. Bowne.

3 Calnes' R.
213, Payne v.
Eden.

CH. 11.
Art. 4.



tion for the benefit of the insolvent. Held, it was absolutely void, though the payee signed last, and without him the insolvent had a sufficient number and amount for his discharge; leaving the date blank, to be filled up after the insolvent's discharge, did not cure the defect; and the contract being void in its execution, was incapable of being affirmed, and when endorsed for the benefit of a relation of the payee, and ultimately his benefit; held, also, it was open in the endorsee's hands to the same objections as in the payee's hand.

10 Johns. R.
250, 251,
Locke v.
Smith.

§ 9. *Agreement implied. In error on certiorari* from a justice's court. Action *assumpsit* for labour &c. against Locke. Smith signed a writing; for value received he promised to paint Locke's house in a particular manner specified in the writing; and B endorsed on it a promise that the agreement should be executed in a workmanlike manner. S. sued L, and he pleaded the agreement by way of *set-off*, and claimed damages for the non-performance. Held, a valid contract between S. and L. which might be *set off*.

Hob. 41, 42,
Cowper v.
Andrews.

ART. 3. Effect of the word *pro* or *for*, and of *conditions in agreements*. § 1. If I agree to sell a horse to A *for* £100, he cannot take him till he pays. So if I agree to pay \$50 *for* a year's work, he cannot sue for the \$50, but on alleging he has done the year's service.

1 Com. D.
401.

§ 2. When an agreement is *conditional*, it is not complete till the condition is performed. As if I sell goods at such a price as A shall name, the contract is not complete till A names the price; but when he does this, it relates back to the time of the agreement, and if the vendor sells in the mean time, an action of *assumpsit* lies against him.

1 Roll. 449.
Bro. Con-
tracts 27.—
1 Com. D.
403.

See Ch. 80, a.
34.

§ 3. If the condition be, *if the vendee like the goods on view of them*, if he agrees or disagrees on his first seeing them, the matter is fixed; but *if the agreement be, that if he likes or dislikes them, at such a day*, if he declare his liking or disliking *before* the day, he may alter it at the day, as he has to that day to form his opinion.

Mass. Act,
June 20, 1788.
This statute as
to paying the
debt of an-
other is the
same as

29 Ch. II, c. 3.

Laws of
Maine, ch. 53.

ART. 4. *Writings, when necessary to support an action on an agreement*. § 1. This article has been already in part considered, in treating of a promise to pay *the debt of another*. This act, 1st, enacts, that "no action shall be brought, whereby to charge any *executor* or *administrator* upon any special promise to answer damages out of his own estate; 2, is as before in regard to paying the debt of *another*; 3, to charge any person upon any *agreement* made upon *consideration of marriage*; 4th, or upon any agreement that is not to be performed *in one year from the making thereof*, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the

party to be charged therewith, or some other person thereto by him lawfully authorized. 5th. That no contract for the sale of any goods, wares, or merchandise, of the price of £10 or more, shall be allowed to be good, except the purchaser shall *accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment*, or that some note or memorandum in writing of the bargain be made and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized." See 29 Charles II, s. 17; Ch. 32, a. 7. A bill of parcels with the deft's. name printed, and vendee's written by vendor, is a good memorandum to charge the vendor. 2 Maule & S. 286.

Ch. 11.
Art. 4.

10 Johns. R.
364.

§ 2. This act is in the same words as was the province statute of 1692, and as is the statute of frauds and perjuries of the 29th Charles II. in England. And the same construction has been invariably made upon all of them. Same in New York act (Sess. 10, c. 44,) enacted, and in most of the states. Hence English constructions apply to them.

10 Johns. R.
244.
Must be express, not to be performed within a year.

§ 3. As to the 1st provision in this act, as to *executors and administrators*, it is plain; so clear, that no questions of any importance are to be found in the books on this branch of the acts. As to the 2d branch of these acts, the *debt of another*; this has been considered in Ch. 9, a. 20. As to the 3d branch, it is settled, that *mutual promises to marry* are not within the act; for they relate only to contracts in *consideration of marriage*, as to pay money, make settlements, &c. in consideration of a marriage had, or to be had. There are, however, some few cases to the contrary, as 3 Lev. 65; Skin. 196.

Strange 84,
Cock v. Baker.—Imp.
M. P. 167.
See Ch. 32.—
Ld. Raym.
387.—2 Eq.
Ca. Abr. 248.
1 Com. D.
199.

§ 4. As to the 4th branch or provision respecting one year. It is settled, that "where the agreement is to be performed on a *contingency*, and it *does not appear within the agreement* that it is to be performed *after* the year, then a note in writing is *not* necessary, for the *contingency might* happen within the year; but when it appears by the *whole* tenor of the agreement, that it is to be performed *after* the year, then a note in writing is necessary," otherwise not. 1 W. Bl. 353.

Imp. M. P.
167, 168.
3 Bl. Com.
Chris. notes,
13.—3 Burr.
1281.—Bull.
N. P. 277.
—See Skin.
336, 363.
1 B. & Alder-
son, 722.—
Salk. 280.—
Peter v.
Frompton,
Skin. 363.—
3 Salk. 9.—
3 Burr. 1278,
Fenton v. Em-
blers, exr.—
1 Ld. Raym.
316, Smith
v. Westal.
3 Burr 1278,
Fenton v.
Embler's exr.
Evid. 366.

§ 5. As where the deft. agreed for one guinea, "*to give the plt. so many guineas* at the day of his marriage." This might happen within the year. So a promise to pay on the return of a ship, which did not return in less than two years; this promise is good without writing, for the event might have happened within a year, and the statutes extend only to those promises that, by the terms of them, are not to be performed within the year.

§ 6. Assumpsit against the deft. as executor of Mary May, in consideration the plt. would be his house-keeper and ser-

—1 W. Bl. 363, cited Rob. on Frand. 169.—Cited 1 Phil.

CH. 11.
Art. 4.



vant &c., by parol, promised her to give her £8 a year, and leave her by his will an annuity of £16 a year. She lived with him till he died, and he not making the provision in his will, she sued his executor; and the court held, that no note in writing was necessary, as it depended on a *contingency* that might happen within a year; as the testator might have died within that time. Bul. N. P. 280.—1 Salk. 279.—1 Ld. Raym. 316.—11 East 142, 159, 366.

2 Vent. 361.
—1 Com. D.
199.—3 Bos.
& P. 233,
Kent v.
Hutchinson.

§ 7. A letter by one is a good *memorandum*, that he promises the thing contained in it, for this matter is in writing and signed by the proper person; but not a letter refusing the offered goods, and returning them, saying the price was too high. Every writing must contain the material parts of the agreement. Ch. 32, a. 10, s. 12.

1 Stra. 506,
Powers v.
Osborne,
cited as law
1 Esp. 14.

§ 8. As to the said fifth provision in the statute as to goods &c., of the value of £10 or more sold &c., numerous decisions have been made. Only a part of the most authentic can be noticed here. The words of this clause in the act may be taken in order. “No contract for the sale” &c. Once held, that this did not extend to contracts *executory*, or *to be executed*; as where the deft. spoke for a chariot, and when made refused to take it; held, not within the act. Like decisions 4 Burr. 2101, Clayton v. Andrews, as to the sale of wheat &c. But this opinion, that the act relates only to *executed* contracts, or where the goods were to be delivered immediately after the sale, has been sometime exploded.

§ 9. It is now held, if the goods agreed for are complete and *ready* for delivery when the bargain is made, the case is within the statute, but otherwise, if *not ready*, but are *to be made* or *manufactured*, or *some labour is to be done*, or *materials provided*, in order to make them ready to be delivered:

1 H. Bl. 20,
Alexander v.
Comber.—
2 Selw. 479.
—7 D. & E.
14.—3 Maule
& Sel. 178.—
2 H. Bl. 63,
Rondeau v.
Wyatt.—See
this case s. 15.
Bernett v.
Hull.

§ 10. Cases. The plt. agreed to buy sheep at the Leeds fair, and take them away at a certain hour. There was no money paid, no sheep delivered; the plt. not coming to take the sheep at the time appointed, the deft. sold them to A, the plt. brought trover. Held, the case was within the statute, and that no property vested in the plt. there being neither *earnest*, *delivery*, nor *agreement in writing*—no doubt the price was above £10. Here was a bare agreement by *parol only*, and no act done to change the property, and the goods were *ready* to be delivered when agreed for. But an agreement to leave money by will, need not be in writing; an act to be done but in future, see Fenton v. Emblers, above, s. 6. The statute of New York, sect. 15, like 29 Ch. II, sect. 17 above, applies as well to contracts *executory* as *executed*. Agreement to sell apples, value above \$25. 10 Johns. R. 364, Bennet v. Hull.—Grover v. Duck, 3 Maule & Sel. 178.—Cooper v. Elston, 7 D. & E. 14.—4 Maule & S. 262,

Astley v. Emery. The next words in the clause are, *goods, wares, and merchandise*; there seem to have been no decisions explaining these words. In **Pickering v. Appleby**, Com. R. 354, 358, the court doubted if they included ten shares of stock in copper mines; many cases cited by the counsel as to the meaning of the words *goods &c.* cited **Roberts on Frauds** 184. See the cases cited **Rob. on Frauds** 184 to 188, as **Colt v. Netterville**, 2 P. W. 307.—**Mussel v. Cooke**, Pr. in. Ch. 533. On the whole, the leaning seems to be, that *stocks* are not goods, wares, or merchandise. Next words, £10 or upwards in Massachusetts, is £10 lawful or \$33.33; New York, £10 or \$25, in England, £10 sterling; so varying in some other states.

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Next words are, "except the purchaser shall accept part of the goods so sold and actually receive the same" &c. There must be an acceptance that confirms the bargain. As when the plt. sent a bale of sponge under a verbal order to the deft. at 11s. a pound. The deft. returned it, and with it a letter, saying it was worth but 6s. and so he returned it. Held, this letter did not amount to such an acceptance of the goods as to take the case of the statute. As to what is a *delivery and acceptance*, see Ch. 32, a. 10, s. 1, 2, 3, 4, **Towers v. Osborne**, **Chaplin v. Rogers**, **Searle v. Kieves**, **Hind v. Whitehouse**. See also **Elmore v. Stone**, 1 Taun. 458, and Ch. 32, a. 3, s. 4, **Atkinson v. Maling**, a ship at sea. See 2 Ves. 272—3 Bro. Ch. Ca. 362, if the buyer treats the goods as if in his actual possession, this is an acceptance that confirms the bargain. The delivery of a *sample* must be a part of the goods sold, Ch. 32, a. 10, s. 4, **Hinde v. Whitehouse**, **Cooper v. Elston**, 7 D. & E. 14.—**Talver v. West**, 1 Holt's R. 178. Quære, as to part performance, 1 Ves. jr. 326, 334.—2 Johns. R. 221, 227, many cases cited undecided, Ch. 32, a. 11, s. 8. Strong cases as to accepting, and received, A. D. 1820, 3 Barnwall & Alderson 321, **Howe v. Palmer**. Vendee, verbally agreed at a public market with the vendor's agent, to buy twelve bushels of tares in the vendor's possession on his farm, to remain there till called for. The agent on his return home measured the twelve bushels, and set them apart for the vendee. Held, no acceptance. Page 680, **Tennet v. Fitzgerald**, A agreed to buy a horse of B for *ready money* and take him away in a time agreed on. Near the expiration of that time A rode the horse, and gave directions as to his treatment, and requested he might remain longer in B's possession, but did not pay. Held, no acceptance. 1 Phil. Evid. 380, 381.

3 Bos. & P.
233, Kent v.
Huskinson.

Next words in the act are, "or give something in earnest to bind the bargain" &c. See cases on this point, Ch. 11, a. 2, s. 1, 2, 3, Ch. 139, a. 8, s. 9, Ch. 214, a. 5, s. 2, and 1

CH. 11. Moore's R. 328, a shilling offered and not accepted does not bind it.

Art. 4. Next words are, "*some note or memorandum in writing of the bargain made and signed by the party to be charged therewith, or some other person thereunto by him, lawfully authorized.*" On this clause the first question is, does the word, *bargain*, include the consideration, so that this must be expressed in the *memorandum*? On this point, see *Wain v. Warlters*, Ch. 9, a. 20, s. 33, Ch. 11. a. 14, and cases there cited, *Hunt, adm. v. Adams*, case Ch. 1, a. 25, s. 1.—*Egerton v. Matthews*, and other cases there cited, Ch. 11. a. 14, and cases there cited, as *Sears v. Brinks*, *Stack v. Sill*, &c. &c., but the word *bargain* is used in the 17 sect. 29 Ch. II. So in Mass. act the word *agreement* is used as to paying another's debt. Then as to *bargain*, *Egerton v. Matthews* may govern, Ch. 1, a. 25, s. 1; Ch. 11. a. 14, s. 5. Why have this and like cases been classed with *Wain v. Warlters*? This too has been questioned by Lord Eldon, 14 Ves. 189, *Minet's case*.—15 Ves. 286, *Gordon's case*.—*Roberts on Frauds* 117, note 58.—*Fell on Mercantile Guaranties* 246, and by C. J. Parsons, Ch. 11, a. 14, s. 5.

9 Ves. 351.—
2 Bos. & P.
238, *Allen v.*
Bennett.

The promisee's engagement need not appear, the jury may find his assent to the bargain; 6 East 307, 308, *Egerton v. Matthews & al.* As where the debts. agreed in writing to buy of the plt. thirty bales of Smyrna cotton, they signed, but the plt. did not. The act is to be signed by the party to be charged. 2 Johns. Ch. Cas. 164.—3 Taunt. 169.—3 Johns. Cas. 60.—4 Bos. & P. 252, 254.—3 Johns. R. 399.—7 Ves. 275, promisee's name must appear &c.

3 Ves. & Bea.
187.—2 Bos.
& P. 238.—
3 Atk. 503,
Ch. 127, a. 5,
s. 2.

What is signing. Making a mark is signing; see the word, *mark*, in the index. So the name printed or written with a pencil is signing. *Saunderson v. Jackson*, 14 Johns. R. 484.—12 Johns. R. 102. Mode of placing the signature, see Ch. 11, a. 7, above. 1 Phil. Evid. 370, 371, 272, 273.

2 Maule &
S. 284.—Ch.
32, a. 10, s. 12,
a. 8, s. 1.—
Material.

The form of the note or memorandum. This is not material; a letter is, Ch. 11, a. 4, 7, a. 8, several cases; a letter written by any one for one party, and communicated to the other is one. 2 Ch. R. 147.—1 Vern. 110, *Hodgson v. Hutchinson*.—5 Vin. Abr. 522, 527. Ch. 11, a. 10, s. 3. But a letter not written to be communicated to the other party, nor actually communicated to him, is not a *memorandum*. 2 P. W. 65, *Ayliff v. Tracy*; but is, if it state the agreement as *already* made by the party, but not to, or for the other party. 3 Atk. 503, and 2 Bos. & P. 238, also *Tawney's Ca.* a. 8.—1 Scho. & Lefr. 22. Enough the letter recognises the past transaction. 1 Atk. 12.—11 Ves. 550.—1 Johns. Ch. R. 273. But the letter or writing signed must lead by writings to the

7 Taunt. 295.
—2 Bos. &
P. 238.

very terms of the contract in writing. 11 East 142.—1 Ves. Ch. 11.
Jr. 326, 334.—1 Scho. Lefr. 22.—3 Ves. & Beames 192. Art. 5.
—2 Ball & Beatty 370.

No *parol* evidence to *vary the memorandum.* See *Mery v. Axsel*, *Preston v. Meruau*, and many other cases, Ch. 93, *parol* evidence, also *Binsted v. Coleman*, Bunb. 65.—1 Ves. 326, 334, Ch. 11, a. 10, s. 1, *Clinan v. Cooke* ib. *Walker v. Walker* ib.—1 Johns. Ch. R. 279, but may be admitted as to the time of delivery &c., 3 D. & E. 590, 592, in *Littler v. Holland*, *Cuff v. Penn*, 1 Maule & S. 21, and Ch. 93, a. 3, s. 15.—14 Ves. 524, 254.

Next words, “or some other person authorized” &c. If an agent sign as a witness it is sufficient, if he know the contents, and puts his name so as to sanction the contract. See Auction and Auctioneer. 9 Ves. 250.—1 Johns. R. 102.

§ 11. *Sales at auction.* (See Ch. 16.) It is said, that sales at public auction are not within the statute, and the auctioneer must be considered as the agent of the buyer (after knocking down the hammer) as well as for the seller, and that his setting down in writing the name of the buyer, the price, &c., was sufficient to take the case out of the statute. See Ch. 16, a. 1, s. 14, *Hinde v. Whitehouse*.—Imp. M. P. 170.—1 Esp. 14.—1 W. Bl. 599.—2 H. Bl. 63, *Rondeau v. Wyatt*. See a. 6, s. 14, and Ch. 16.—*Blagden v. Bradbear*, 12 Ves. 466. 3 Burr. 1221, *Simon v. Motivos*.—Bul. N. P. 275.

§ 12. But in *Rondeau v. Wyatt*, Lord Loughborough held *executory* contracts within the act, though it has been admitted by the party in his answer in chancery and is void, 7 D. & E. 18.—Sel. 153. 2 H. Bl. 63.—1 Com. D. 198.—1 Phill. Evid. 359.

§ 13. Held, that a sale *at auction* of lands is within the act. See more of sales at auction, Ch. 16, and New. on Contracts 176.—1 Esp. R. 105, 107.—7 Ves. 341.—9 Ves. 249.—4 Taun. 208.—2 Taun. 28. It seems to be well settled, that in the sale of *goods* the auctioneer’s writing down the buyer’s name, is a signing by an authorized agent of the parties. So is the better opinion as to the sale of *lands*, but the agent must not be one of the parties. Bos. & P. 306, *Walker v. Constable*.—Ch. 32, a. 9, s. 9. Ch. 32, a. 10, s. 12.

ART. 5. A *parol agreement* cannot control a deed, and how far a writing? § 1. *Covenant.* The plts. agreed to build two houses for the deft., on or before April 1, 1788, in consideration whereof, the deft. was to pay £500. Held, the parties could not, by a subsequent *parol* agreement, enlarge the time for building the houses, for the obligation of a covenant cannot be varied by a *parol* contract. As to the certainty of the contracts, see Ch. 225, a. 10, s. 5. Littler v. Holland.—3 D. & E. 590, 593.

§ 2. Debt on arbitration bond; award to be made by a certain day. The declaration stated, that the parties afterwards, by mutual consent, enlarged the time, within which 3 D. & E. 592, *Brown v. Goodwin*.

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enlarged time the award was made; on demurrer it was held, that the plt. must rest on the bond, which could not be extended to an award made after the time expressed in the bond, under a new agreement, so it was void.

3 D. & E. 592.

§ 3. *Writing*. An action was brought on *written articles* as to the theatre. These articles required a *written license* to the party to be absent. The deft. proved a *parol* license to be absent, but as the articles required a license in *writing*, the court held that a *parol* agreement was no answer to the plt's. action against the deft. for being absent.

2 D. & E. 425,
Roe v. Harrison.

§ 4. A lease contained a proviso, that the lessee should not let, without *leave in writing*, on penalty &c., a *parol* license was adjudged to be insufficient to discharge the lessee from the restriction of the said proviso. In these two cases it was a part of the contract that the licenses be in writing; hence, these decisions do not directly prove in themselves, that *written* are more valid than *parol* agreements.

3 Bl. Com.
Chris. Notes
13, see Ch.
32.—Pow. on
Con. 292, &c.
—Cooper's
Pl. 133, 166,
167, 340, 341.
—10 Mod.
572, New. on
Con. 34, 36.

ART. 6. *Parol agreements as to lands*. (See art. 10, a. 11, a. 12, this chapter and Ch. 32.) When a *verbal* contract is confessed by the deft. in his answer, or where there has been a part performance of it, as by paying part of the consideration money; or by entering and expending monies on the lands, equity will decree a performance; for in either case the *acts done* afford such evidence of the contents of the contract, that no essential danger arises of fraud and perjury by letting in evidence of a *parol* agreement.

2 Vent.
306, Mile r.
Lower.—
11 Mod. 467,
Coventry's
case, and
New. on Con.
35, 36, &c.—
Hinton v.
Hinton, Co-
per's Pl. 133.

§ 2. In the case of an agreement for the sale of lands, the vendor, in equity, is deemed a trustee for the vendee till the conveyance is executed; and covenants, contracts, and agreements, founded on valuable considerations, are viewed in equity as if they were actually performed, and the legal defects in their execution are aided by equity. Hence, if one covenant to sell and convey land, and die before conveyance made, equity will compel his heir to execute it; but not if the vendor be tenant in tail, and his contract exceed his power; nor of stock or chattels, as corn, hops, &c. 1 P. W. 570.—10 Vesey 161.

Dougl. 620,
Luxton
v. Robinson.
—Phillips v.
Fielding,
3 H. Bl. 123.

§ 3. *When the plt. is to deliver possession and receive money, his declaration ought to shew he has a right to deliver it.*

As where in an *assumpsit*, on an agreement by which the deft. was to take of the plt. certain lands and goods, that should appear to be his property, by appraisement, or forfeit £5 5s. and if either party failed to perform he was to pay £10 to the other, exclusive of the deposit, the deft. to take possession on a day fixed. The plt. averred that on that day he was ready to deliver the premises to the deft., but that he did not accept them, but refused to do so, and so became liable to pay the

\$10, exclusive of the deposit. There was a special demurrer to the declaration ; three causes were assigned ; one, that it did not appear the plt. had any interest in the premises at the time of the agreement. The court decided, that " the plt. was to *deliver possession*, and therefore he ought to have shewn, that he had a right so to do." *St. Albans v. Stone*, 1 H. Bl. 270. A leased his farm to B by deed, they then agreed by *parol* B should pay for a pasture part of it ; this is void.

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§ 4. This act provides, 1st section, that all interests in, or out of, *lands, tenements, or hereditaments*, created by livery and seisin only, or by *parol*, and not *put in writing*, and signed by the party creating the same, or his agent authorized in writing, shall have only the force of estates at will, and no interests therein or thereout shall be assigned, granted, or surrendered, but by deed, or note in writing signed as above. Sealing a will is a signing, 2 *Stra.* 761, *Warneford v. Warneford*.

9 Johns. R.
358.—Mass.
Act March
10, 1784.—
N. York Act
the same.

§ 5. 2d. section enacts, that no action be maintained on any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, unless the agreement or some note thereof be in writing, signed as above.

Doubted,
6 Cruise 50.
—1 Wils. 313.

§ 6. 3d. section enacts, "that all grants and assignments, as well as all declarations, or creations of trusts, or confidences of any lands, tenements, or hereditaments, shall be proved by some writing signed by the party, who is by law enabled to grant, assign, or declare such trust, or by his last will in writing," or else be utterly void ; provided that where any conveyance shall be made of any lands &c., by which a trust or confidence may arise by implication of law, or be transferred, or extinguished by operation of law, then such trust to be of like effect as it would have been if the act had never been made.

§ 7. 4th section enacts, that all deeds and other conveyances of lands, tenements or hereditaments, signed and sealed, by the grantor having right, and acknowledged by him, and recorded at length in the registry of deeds, in the county where the land is, shall be valid to pass it, without any other ceremony in law ; and no conveyance in fee simple, fee tail, for life, or any lease for more than seven years, of any lands &c., shall be good, to hold the same against any but the grantor and his heirs only, unless the deed or deeds be so acknowledged and recorded.

§ 8. This act is in substance worded as the Province act was of 1692, except in the first provision. This Province law excepted leases not exceeding three years, on which a rent was reserved equal to two thirds of the improved value. And the province law of 1697, the 1st, 2d, and 3d sections, with said exception, are copied, in substance, from the 29th of Ch. II., the English statute respecting frauds.

Note ; the
acts here cit-
ed art. 4 & 6,
being in sub-
stance that of
29 Ch. II.
are generally
in substance
in the several
states the
same.

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Art. 6.

2 Cain. 64.—
Sugden 60,
63.—2 Vent.
361.—Vern.
366.—12 Ves.

466.
1 Bac. Abr.
73.—9 Ves.
249.

Imp. M. P.
167.—1 Ld.
Ray. 82.—
1 Atk. 12.—
Bul. N. P.
277.

Imp. M. P.
167, *Stans-*
field v. John-
son.—See 4
art.—1 Selw.
N. P. 153.—
2 Esp. R.—
8 D. & E.
151, *Simonds*
v. Ball.

1 Ves. 466.—
2 Taun. 38.—
13 Ves. 36.—
As to grass
growing, see
Crosby v.
Wadsworth,
Ch. 32, a. 9.

1 Com. D.
220.

§ 9. Upon these statutes, in substance the same, there have been the following material cases and explanations, viz :

§ 10. If A buy lands in his name, with B's money, it is a trust for B, though there be no deed declaring it, for the act extends not to trusts raised by operation of law ; but the evidence of the fact must be clear ; was in equity—12 Mass. R.

§ 11. A *parol* agreement, intended to be reduced to writing, but is prevented by the fraud of the party to be bound, may be decreed in equity.

§ 12. A contract for the sale of timber growing on the land, is not within the act, but may be by *parol*, because it is a bare chattel ; the authorities however are not entirely uniform on this subject, but some hold such trees an interest concerning lands.

§ 13. A sale of land at auction is within the act, though knocked off to the best bidder, and his name written in the catalogue as a purchaser ; the deposit not being paid, and he failed in his special action according to *Eyre C. J.* This doctrine of a sale at auction not being within the act, is on the whole unsettled. In the case of *Simon v. Motivos*, so often cited, there was a particular circumstance that had weight, to wit : the next day the buyer came and saw the goods weighed, which the court thought a circumstance that deserved some attention, as it amounted to a delivery of the goods.

Buller 280 cites this case, and adds the court decided, 1st. They thought a sale at auction not within the act, because so public a matter. "2d. They thought the contract here was sufficiently reduced into writing, and signed by an agent of the deft's., for the auctioneer was for that purpose his agent." 3d. They held the weighing by the deft's. servant was a delivery. 4th. That it was not within the act, as the contract was executory, to wit : the lot to be fetched away in six weeks.

Imp. M. P. 170, cites this case as it stands in 3 *Burrow*, and approved it, as there decided. Timber and trees growing are a chattel, 1 Ld. Raym. 182.

§ 14. 1. *Esp.* 14, the rule is laid down thus, "goods sold at public auction are not within the statute, that is, no earnest or note in writing between the parties is required ;" and cites as an authority this same case of *Simon v. Motivos*.

§ 15. Thus "buying and selling at auction, is not within the statute of frauds—semble. But certainly the auctioneer's setting down in writing, the price, the buyer's name, &c. is sufficient ;" and cites as an authority, this case of *Simon v. Motivos* ; (as to an executory contract,) the court said, "the case of *Simon v. Motivos* was decided on the ground, that the auctioneer was the agent as well for the deft. as for the plt.,

and therefore the contract was sufficiently reduced to writing." It is clear the court, and also individual judges and authors, strongly incline to hold a sale at auction not within the statute. But then it is to be noticed that all the cases cited refer to *Simon v. Motivos*, as the only authority, and the buyer's attending to the weighing the goods the next day, was a circumstance peculiar to that case, and may have had much weight in the decision of it; and the case in 1 Bos. & Pul. 306, is a late and direct case, by the whole court, that a sale at auction of lands is within the statute. On the whole we must wait for some further decisions on this subject, as it is clear the law is not yet well settled upon it. The plt. cannot recover in England on a contract made in Jamaica, void there for want of a stamp.

§ 16. The agreement must be actually signed, but the manner of signing is not so material; therefore where a mother, who agreed to give her daughter a portion on her marriage, did not execute the articles, nor was she a party to them, but only set her name to them as a witness; it was adjudged that this was a sufficient memorandum in writing to bind her; the writing had been read over in her hearing; this was a material circumstance, as it proves she knew the contents of the writing. 1 P. W. 770; 6 Br. P. 645; 2 Br. C. C. 569; 1 Bin. 217; New. on Con. 171, 174.

ART. 7. *The mode of placing the signature.* § 1. The signature must be so placed on the writing as to give authenticity to the whole instrument; and where the name was so inserted as to have that effect, it did not much signify in what part of the instrument it was to be found; it must be so placed as to shew that the party signing sanctions the whole instrument. 15 East 103; manner of signing, see *Egerton v. Matthews*; also *Champion v. Plummer*, 1 New. R. 252; 2 Bos. & P. 238.

ART. 8. *How a letter will, in equity, amount to an agreement, and bind the person signing it.* § 1. If another person, by acting upon it, shews his acceptance of the propositions contained in it; as where the father wrote a letter assenting to his daughter's marriage with J. S., and mentioned her portion in marriage, and J. S. married her. It was held the father was bound. And New. on Con. 165.

§ 2. The same principle in regard to a letter, applies also as to land, and other clauses in the statute. But if the above letter had not been shewn to J. S., the case had been different, though he had married the daughter, for he could not have accepted of an agreement of which he had no knowledge. And the letter must contain the precise terms of the contract at

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2 H. Bl. 67,
in *Rondeau*
v. Wyatt.—
4 Wheaton
86, 98.—
1 Phil. Evid.
366, holds
sales of land
at auction
within the
act, several
cases.—*Wal-*
ker v. Con-
stable.
7 D. & E.
241, *Alves v.*
Hodgson.—
Pow. on Con.
272, 284.—
1 Wils. 118,
119, *Wilford*
v. Bagley, in
Chancery,
A. D. 1766.—
3 Johns. R.
399.—4 Dall.
152.

18 Ves. jun.
175.—1 P.
W. 771,
Stokes v.
Moore.—See
Lofft 786.—
Pow. on Con.
286, 286.

2 Vent. 361,
Bird v.
Blosse.—
2 Rep. in
Chan. 147,
Moore v.
Hart.—*Pow.*
on Con. 288,
290.
2 Bos. & P.
238.—
1 Price 64.—
3 Taun. 172.
—Stra. 426.
—Prec. Chan.
560, *Seagood*
v. Meale.—
2 Eq. Ca.
167 to 170.

Abr. 16.—2 Cain. Er. 87.—New. on Con.

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New. on
Con. 170,
171.—Clerk v.
Wright,
1 Atk. 12,
497.—2 Ch.
Ca. 164.—
1 Eq. Ca.
Abr. 20.—
2 Com. D.
333 to 362, &
Rep. in Chan.
—2 Ch. Ca.
135.—1 Vern.
472.—Bunb.
65, 94.—
Ambl. 586.—
2 Freem. 268.
—7 Ves.
341.—New.
on Con. 167.
—Prec. Ch.
374, Sym-
mondson v.
Tweed; 208,
Vaughan v.
Morgan.—
Cooper's Pl.
255, 256, the
part perform-
ance must be
of a substan-
tial part;
256 statute
waived.—
New. on
Con. 172,
173, 175.—
Pow. on
Con. 296.—
Prec. Chan.
519—4 Ves.
jun. 720.—
Ambl. 586.—
3 Ves. jun.
378.—2 Vern.
627.—New.
on Con. 179,
180, 181.—

Pow. on
Con. 300,
301.—1 Vern.
363, Butcher
v. Stapeley.—
Pow. on
Con. 300,
301.—2 Com.

large, and must contain the certain date of a contract; for if uncertain in material parts, a door is open to fraud and perjury, the real evil the act was made to guard against, and there may be as much room for perjury in proving a vague contract that exists, as in setting up one that never existed. A contract's merely being in writing is no security against fraud and perjury, if there be no certainty in it; but the letter may refer to a paper not signed. 3 Bro. C. C. 161, and 318 and 149; New. 167, 168, 169; 4 Mun. 77.

ART. 9. *Parol agreements as to lands &c., in equity.*

§ 1. These are executed in equity in several cases. On these principles the intent of the act is to prevent fraud and perjuries; and whenever the facts are to be ascertained by confession, possession, &c., as that such agreements may be carried into effect, without danger of frauds and perjuries, a court of equity will execute and complete them. It is not the intent of the statute "to vacate bargains fairly and honestly made;" hence equity will enforce them.

§ 2. When the plt. in chancery states the substance of his case in equity, in his bill there, and the material parts of the agreement, and the deft. in his answer admits the facts stated in the bill, this takes the case out of the mischief pointed out in the act; for when the agreement is confessed in writing by the deft., there "can be no danger of perjury from a contrariety of evidence," and the rule is the same in courts of law as in courts of equity. All the evils the legislature meant to prevent by passing the act, are thus avoided, and it does not prescribe any particular time when the contract or agreement, shall be put in writing, but the agent's drawing the writing is not equal to his principal's signing.

§ 3. When the *parol* agreement has been partly executed, and one party has incurred expense in improvements, if the terms of agreement "can be made out satisfactorily to the court, the agreement, though resting on *parol* evidence, will be decreed," though a variety of evidence be adduced in the cause. As if the lessee by *parol lease of land* for many years, has begun to build, his agreement shall be completed, for the lease is part executed on his part, and the lessor shall not avail himself of his own fraud, and get the lessee's improvements from him. Sugden's Vendors &c. 85, but to make one guilty of fraud he must have notice.

§ 4. When possession is given, in pursuance of the agreement, this is so far a performance as takes it out of the statute, though the buyer has not laid out monies on the premises. As where A seised of lands, agreed with B to sell them to him, and a short note was drawn up of the agreement, but not signed by

D. 337, 338; also 2 Vern. 455.—Prec. Ch. 519.

either party, and soon after the agreement B put his cattle in, and made encroachments on A's other lands. A then sold the premises to D, but the agreement with B was decreed, for when possession was delivered according to the agreement, the bargain was executed. And in this case it was also held, that taking possession under the agreement, was notice to subsequent purchasers, and no action can be supported against B for the profits of the lands. But the act done in part performance must be such as would not have been done, unless on account of the agreement, otherwise it is not evidence of it. 2 Vern. 455, *Pyke v. Williams*; 2 Stra. 783; Bunb. 94; 9 Mod. 37; 18 Ves. jun. 328; 2 Ball & Beatty 343, *Givens v. Calder*; 2 Desaus. Ch. R. 171; 1 do. 350; 2 Day's R. 225, *Toote v. Midleott*; 1 Ball & Beatty 393; 2 Dow 559; 5 Bin. 199.

CH. 11.
Art. 9.

§ 5. When earnest is paid, an action at law may be supported for damages for non-performance, though there be no remedy in equity, as by the payment of *earnest* the agreement is partly executed, the property is changed, and a right to it is vested in the purchaser. 1 Bac. Abr. 74, *Sansum v. Butler*.

§ 6. Generally in confirmation of the principles thus briefly stated in this article, as to those *part performances* of *parol* agreements which do, or do not take them out of the statute of Frauds, 29 Ch. II. re-enacted in many of our States with some variations, it may suffice at present to refer to some other late chancery reports, especially those of Wheaton, Johnson, and Munford; some late cases in Massachusetts, Pennsylvania, and South Carolina, and a few very late English cases, mostly abridged in several parts of this work.

§ 7. As to *part* performance of such agreements by *paying a part of the consideration money*, it may be observed, that on a careful view of the authorities, it is clear that paying a *small* part does not take the case out of the statute of frauds; and that if a *considerable* part of it be paid, there is no settled rule yet adopted, but all depends on circumstances. Generally on paying a small or considerable part of the consideration money, the result is, a remedy, an action at law for money had and received, or for money paid, to recover back the part paid, or by a suit in chancery to the same purpose; the one or the other according to circumstances; and whether an action at law, or a suit in chancery is to be resorted to, is often a question of some difficulty. Often equity will decree monies to be repaid, when an action at law is not maintainable, for want of legal evidence, or some other cause, and often when an action can be supported, equity will not interpose, and in our system usually cannot, if the right of action be clear. As to the action

CH. 11. see Ch. 32, a. 4, s. 20.—Chancery Cases, Ch. 225, a. 6, s. 25, &c.—2 Eq. Ca. Abr. 46, Pl. 12.



It follows, whether a party sues at law or in chancery, it is often material he have a general knowledge of the principles of proceeding in both. Hence, in bringing the action of *assumpsit* for money had and received, monies paid or lent, some general attention must be paid to chancery cases. As to cases of part performance of parol agreements, see *Syler's lessee v. Eckhart*, 1 Bin. 378.—*Smith v. Patton's lessee*, 1 Serg. & Rawle 80.—*Billington's lessee v. Welsh*, 1 Bin. 125.—*Trame v. Dawson*, 14 Ves. jr. 386.—[*Tothil* 85, 135, 206, before the statute.] As to paying a *small* or *considerable* part of the purchase money, a matter so uncertain, see *Butcher v. Butcher*, 9 Ves. jr. 282.—*Thompson v. Tod*, 1 Peters' R. 388.—*Bell v. Andrews*, 4 Dallas 152.—*Clinan v. Cooke*, 1 Scho. & Lef. 22 and 123. On the whole it appears, though not clearly, that merely paying purchase money does not take the case out of the statute.

§ 8. *A fact misstated by mistake in a writing, how corrected.* May be by parol testimony, as Ch. 193, a. 2, s. 22, &c. So by verdict on an issue out of chancery, as where the parties agreed to *two* months' notice, by *mistake* written six months; on a bill filed, a jury's verdict was taken, which found the agreement was *two* months, and decree accordingly. *Dr. Olliffe v. the South Sea Company*, 5 Ves. jr. 601, cites 2 Ves. 377, and refers to *Pimber v. Mathers*, 1 Bro. C. C. 52. See the word *mistakes* in the index, also *surprise*. Cases in which *mistakes* in the written agreements have been corrected, or not, by *extrinsic* evidence, 3 Hen. & Mun. 399 to 435, *Tabb & al. v. Archer & al.* A. D. 1809, wherein are cited most of the *English* cases on the point, but no *American* cases, except a few in Virginia. *Harwood v. Wallis*, 2 Ves. 198.—*Coldcot v. Hide*, 1 Ch. Ca. 15. In *Hesse v. Stevenson*, 3 Bos. & P. 365, 578.—*Young v. Young*, 1 Dick. 295, 303, 304.—*Rogers v. Earle*, 1 Dick. 294.—*Rob v. Butterweck*, 2 Price 190; in these and many other cases the principle has been recognised, that *parol* evidence may be admitted to correct mistakes in written instruments; but usually with much caution.

§ 9. If these be made contrary to the intention of the parties merely to avoid a forfeiture, they may be corrected by parol evidence. *Harvey v. Harvey*, 2 Ch. Ca. 190.—*Stratford v. Powell*, 1 Ball & Beatty 1.

§ 10. But if the parties omit any provision in a written instrument as being illegal, and trust the honour of each other, they must abide by it. 1 Bro. C. C. 92.

ART. 10. *How far parol agreements can affect written ones.* CH. 11.
 § 1. In applying the law, *parol* agreements are not so totally void, Art. 10.
 as not to be let in, both by *courts of law and courts of equity*,
 to controul *written* ones on the *same* subject; they are let in Pow. on Con.
 as *circumstantial evidence* to controul the latter, to prevent 294, 296, Le-
 the *fraud* taking place, which might arise from insisting on gal v. Miller,
 something in that *written* one, which deprived the party of the Higginson v.
 right and advantage of detecting the *fraud*, as a subsequent Clowes.—
parol agreement on the *same* subject between the *same* parties, 15 Ves. jr.
 varying or discharging their former *written* one. The reason 516.—Scho.
 seems to be, the statute was not so much made to prevent the & Lef. 36,
 transfer of rights and interests in *lands or real estates*, by 123.—See
parol agreements; but mainly to prevent the *frauds and per- this subject*
juries that might follow; and therefore, like the acts of limi- more in de-
 tations, grounded mainly on principles of *policy and conven- tail, Chapters*
 ience, as seeing the mischief, not in the *parol* transfer itself, as 32 and 93,
 a thing among *honest* men; but in the *fraudulent and false use, &c.*—15 Ves.
bad men might make of such *parol* contracts. Clinan v. Cook. jr. 516.—
 So *parol* agreements are admitted to *rebut an equity*; as 1 Phil. Evid.
 where a plt. in his bill demands a specific performance of a 510, 511, &c.
 written agreement, the deft. is allowed to prove by *parol*, that —New. on
 agreement is discharged, or is not the true one. Sugden's Ven. Con. 204, 211,
 111, 112. Rich v. Jack-
 son, Walker
 v. Walker.

§ 2. This statute of March 10, 1784, respects *lands only*, 2 Atk. 98.
 and not goods. The main occasion is, *questions as to lands*
 may arise at very distant periods of time; not so as to *goods*,
 for several reasons. The statute makes *these interests in lands*,
 created by *parol*, *only estates at will*; and forbids their
 transfer by *parol* contracts; and makes these void, and says
no action shall be maintained on them. As they cannot be the
ground of a suit they cannot be used, unless as having an *equit-*
able effect in doing justice. On a bill in equity to enforce the
 execution of a *written* agreement, it does not appear to be
 contrary to the statute, to use a *parol* agreement clearly prove-
 able between the same parties, and on the same subject,
 operating to controul the *written* one, whenever it may tend to
 do injustice. And so in an action on such *written* agreement
 for damages, the *quantum* of which must ever be a matter of
equity and conscience, it does not appear to be against the
 statute, to let in such *parol* agreement in *fixing* this *quantum*.
 The statute says it shall not be the ground on which to maintain
 an action; but it would be a rigid and hard construction of
 the act, to say this *parol* agreement should not be used as
circumstantial evidence in a case, when clearly tending to
 justice and equity. How far *parol* evidence can control *writ-*
ten, on the *common law principle*, is another matter; the set-
 tled principle seems to be, that *parol* shall not *contradict*, but

CH. 11. may explain written evidence at common law. But when a statute denies to *parol* evidence its *common law capacity to be the ground work of an action*, it does not follow that it is not to be used as *circumstantial* evidence in a suit on *written* evidence in the same case, when justice and equity may require it. Evidence inadequate in itself to support an action, is often admissible in *equitably fixing the quantum of damages*, or in *measuring justice between parties in equity*.

See Ch. 93.

Halfpenny v. Ballet,
2 Vern. 373,
cited Pow.
on Con. 298.

2 Vern. 322,
Wankford v. Fotherly,
cited New. on
Con. 165, 179
—4 Cranch.
239, Young v. Preston.

3 Co. 25 to
36, Buller v. Baker.

§ 3. The principle seems to be, that *equity* will not suffer a party to plead the statute of frauds, to cover his own frauds. As where a marriage treated of between the plt. and deft's. daughter, a *written* agreement was made and signed by the plt., and delivered to the deft. to be signed by him; this he refused to do, being dissatisfied with some parts of it, not very material. He, however, permitted the plt. to court and marry his daughter, and made no objection till asked to pay the portion. Under these circumstances the master of the rolls decreed a specific performance, considering the deft's. conduct as *founded in fraud*. On the same principle was founded the decision of *Wankford v. Fotherly*, 2 Freeman 801. Therefore to prevent such frauds, *parol* evidence is let in. Held, if A agree under seal to do certain work for B, and does part, and B prevents his finishing it, yet A must sue on the writing.

ART. 11. *Agreements waived*. On a special verdict in trespass, it was held: 1, that if land be given to *baron and feme* in fee, or in tail, and he dies, she cannot divest herself of the freehold by any *verbal* waiver or disagreement *in pais*, and before entry by her. So if before entry she says, by *words in pais*, she agrees to an estate, yet she may waive this in court; for a *verbal* agreement has no effect in law in such a case; otherwise, if she enter and take the profits.

Second, if a man take a distress for one thing, he may in court avow for another.

Third, an estate is made to husband and wife in tail, he dies; *dower* by word is assigned to her, which she accepts, but adjudged, that this her refusal of the estate of *inheritance*, and accepting *dower in pais*, should not divest the freehold out of her.

Fourth, a joint tenancy is made to four men, and delivery to three in the name of all, and after seisin was given, the fourth came and saw the deed, and said he disagreed; yet it was held, that this disagreement *in pais by word* did not divest the freehold out of him.

Fifth, if one enters, and disclaims afterwards a part, he remains *in toto*, till disagreement in a court of record.

Sixth, lands are given in tail to *baron and feme*, he aliens them to the use of him and his heirs, and devises them to his

wife for life, and dies; *she enters and claims by words the estate for life.* This is a good disagreement to the estate of inheritance; and a good agreement to the estate for life; for the act and words work together, the same as to a use or bond; the act that explains the intent and operates, is done in possession. A sells lumber to B to the amount of \$400; B agrees to endorse this sum on his bond against A, and does not; A may recover for the lumber.

CH. 11.
Art. 13.

5 Johns. R.
193, 196,
Eels v. Finch.

ART. 12. *Agreements partly performed.* A agreed in writing to erect and finish a barn for B by Aug. 1, 1803, at which time he was to receive \$400 of B in full compensation; afterwards A left the work unfinished against the wishes of B, "who was obliged to get other workmen at his own expense, and with considerable trouble to complete the same." These and other damages to pay &c. exceeded the balance of the \$400 unpaid to A, but the money actually paid him was not in proportion to the work he had done. The court decided, that A had no action against B; by the contract A was not entitled to receive any thing from B until the contract was executed on A's part, "and his failure did not arise from inevitable accidents, but from his own neglect; for he voluntarily left the work unfinished." Tender of a conveyance is no performance of an agreement, there must be something in actual execution of the contract. As where A by letter offered \$10,000, B answered he would not take less than \$11,000, A answered, I will give \$11,000. Held, this was not an agreement executed in writing. *Lofft 786, Popham v. Eyre.*

2 Mass. R.
147, Faxon
v. Mansfield.

ART. 13. *Promises not within the act as to lands.* If a debt originate in the sale of land by the plt. to the deft., his special promise or *assumpsit* to pay this debt is good, and not within the statute of frauds, and may be proved by *parol* evidence. The consideration of the special promise was the plt's. taking a third person's note in part payment of the pre-existing debt, and discounting \$31 out of it, for it is immaterial what was the origin of the debt due to the plt., if it was a just debt, "whether it accrued from the plt's. having theretofore sold land to the deft., or from any other lawful consideration." If it accrued from the plt's. selling land, he did not demand land.

New. on
Con. 182.—
4 Mass. R.
406, Dilling-
ham v. Run-
nels.

§ 2. The plts. gave a release to Gernon of his warranty of lands, for which the deft. received money. His implied promise to pay it to them, is not a contract concerning lands, within the statute of frauds. 2. The rule, that one is estopped to aver against his own deed, does not apply to a deed obtained by *fraud*.

4 Mass. R.
468, Bliss v.
Thompson.—
1 Phil. Evid.
485.—3 De-
sans. Eq. R.
594.

§ 3. If one overreach another by false allegations, or fraudulent concealments, the law will compel him to pay over the frauds, in an action for a tort, a *parol* agreement for the sale of lands; being *gesta*, may be given in evidence.—2 Day's Ca. 531, Bulkley v. Storer.

Notwith-
standing the
statute of
part of the *res*

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Art. 13.

monies obtained by such means to the party, to whom *in* equity and good conscience it belongs. The plts. recovered of Thompson the difference between the sum he received of Gernon for their release of his warranty to him, and the sum first paid to them for it by the deft. "A deed obtained by fraud is to be considered as a void contract, as to the fraudulent party."

5 Mass. R. 133, *Sherburn v. Fuller*. See *Foot v. Colvin & al.*—2 Johns. R. 215.—See Ch. 114, a. 17, s. 9, as to resulting trusts.

§ 4. A made a deed to B by C's appointment, and this was delivered by A to B, on B's *verbal* promise to C, that if he in a reasonable time paid B a certain sum, B would convey to C a certain house &c. and give him three notes for a certain sum; and if in a reasonable time C elected not to pay the monies, then B would not record the deed, but deliver it to C. C elected not to pay the money; yet B refused to deliver the deed to him, but recorded it. In an action of *assumpsit* by C against B on this promise, the court held, that it was within the statute of frauds, *as concerning the sale of lands*, and not to be proved by *parol* evidence. A's deed to B was of land in Cambridge. In this case B's promise to C was *directly concerning a conveyance of an interest in lands*. The house &c. was in Boston.

5 Mass. R. 164, *Tucker v. Bass*.

§ 5. In this case the plt. agreed to let a turnpike corporation have his land for the turnpike, *not in writing*; the deft. in behalf of the corporation promised in writing to pay him \$100 an acre; the court held, that the deft. is bound, and this means a perpetual easement.

This action relating to the case of stating the *consideration* in a writing to pay the debt of another ought to be examined.

5 Mass R. 358, *Hunt, adm. v. Adams*. See *Allen v. Kitteridge*, Ch. 20, a. 21. 4 Whenton's R. 85, 98.—See 2 Johns. R. 211.—See Ch. 32, a. 4, s. 23.

In this case the contract was thus: "*Lee, July 23, 1804. For value received I promise to pay Isaac Bennett \$1500 on the 1st day of Dec. next, with interest; pay to be made at Cock-sackie.*"

\$1500

Witness my hand, JOSEPH CHAPLIN.

I acknowledge myself holden as surety for the payment of the demand of the above note.

Witness my hand, BARNABAS ADAMS.

Judgment for the plt., administrator of Bennet against the surety, on the ground it was "a joint and several promise." On the deft's. part it was objected, that this was "a collateral undertaking to pay the debt of another," and "was within the statute of frauds, in the construction of which it had been held, that the *consideration* of the promise, as well as the promise itself, should be in writing. This objection was grounded on *Wain v. Warlters*, 5 East 10, 20.

See Ch. 9, a. 20.

But the court held, this was not a promise by Adams to pay the *debt of another*, but an *original* promise, joint and

several, in which *Adams* was named *surety* for his benefit, and that both promises appeared to the court to be of the same date. The Chief Justice, Parsons, in giving the opinion of the court said, the decision in *Wain v. Warlters*, rested "upon the legal import of the word *agreement*, as including not only the promise, but also the consideration for which it is made." "And if *agreement* as used in the statute is to be taken, not in a popular, but in a strictly legal sense, it may be unreasonable to question the decision." "On looking further we find the case of *Egerton v. Mathews*, 6 East 307, where it was determined on the seventeenth section of the said act, (similar to the second section of our statute) that a memorandum of a *bargain* for the sale of goods, signed by the party to be charged, would take the contract out of the statute, although the consideration of the *bargain* was not expressed in the memorandum." "The two decisions are not easily reconciled." And the court on the whole doubted as to the case, *Wain v. Warlters*, and thought the word *agreement*, in its popular sense, means only the promise of the party charged, "and as not necessarily including the consideration for it." See 13 Mass. R. 87, *Penniman v. Hartshorn*.

§ 6. As it appears in this case that *Adams'* promise was in writing, nor does it appear, but by implication, that he did not receive a part of the consideration; the most material question did not arise in regard to promises required to be in writing: had *Chaplin* borrowed \$1500 of *Bennet*, and promised, by *parol*, to repay it; and had *Adams*, by *parol only*, and not in writing, at the same time, as surety, acknowledged he was held to pay this debt, the important question would have arisen, if he were bound to pay it. Certainly not, if his promise had been made after *Chaplin* had created the debt and become debtor, for then it had become his existing debt, and *Adams'* promise would have been to pay the existing debt of another, and must have been in writing.

§ 7. Case on a guarantee of debt. for not paying for goods delivered to one *Nichol*. It was "I guarantee the payment of any goods which *J. Stadt* delivers to *J. Nichol*," signed by the debt. Held, valid within the 4th section of the statute of frauds, as containing a sufficient description of the consideration of the promise, namely, the delivery of the goods when made, as of the promise itself, both which are included in the word *agreement*, required by that section to be reduced into writing. It will be observed, here was no description of the consideration, but merely saying the plt. delivered goods to *J. N.* No mention was made of any quantity or description of them, but only any goods the plt. should deliver, more or less, of this sort or that. Here then the consideration was des-

CH. 11.

Art. 13.

8 Johns. R. 210, *Sears v. Brink* is a case like *Stadt v. Lill*, *Egerton v. Mathews*.

9 East. 348, 349, *Stadt v. Lill*.

CH. 12.

Art. 1.



cribed in the most indefinite *manner*, if described at all ; and and this case was after that of *Wain v. Warlters*. In *Clinan v. Cooke*, 1 Schoales and Lefroy 22, it is said, a written agreement for a lease under a certain rent, ought to specify the term for which the premises are to be demised ; there can be no doubt of this, at common law such certainty was required. 1 New. Rep. 252, 254 ; *Champion & al. v. Plummer*. The writing named only one party, the seller, and not the buyer, and the court properly said, there was no contract or memorandum of one. 1 Phil. Evid. 368 ; 2 Phil. Evid. 81, 82. It is said, it is not necessary to state precisely in the *memorandum* for paying another's debt, the exact amount of it. It is enough to engage to pay generally, for all goods furnished in in a certain time &c., and the amount of them, or of the debt the third person owes, is to be ascertained by evidence at the trial. 15 East. 272, 274 ; the result, some sufficient consideration must be named.

CHAPTER XII.

ACTION OF ASSUMPSIT. APPRENTICES.

ART. 1. *Between master and apprentice, as far as it relates to them.*

§ 1. The rights and duties arising from this relation, will be very briefly considered in this place, and treated of more at large under the head of Covenant, and therein apprentices by indenture, the usual form of contract used in constituting this relation.

§ 2. An *apprentice* is one bound, or put to a master, usually for a term of years, to serve him and to be maintained and instructed by him ; and as the master must maintain and instruct him, he has a property in his services. The apprentice is with his master on a *personal trust*, and cannot be assigned, or pass to executors or administrators ; but the master may let him to another man, occasionally, to be employed in business not inconsistent with the intention of the apprenticeship, and recover his wages and a *quantum meruit* for his services. And the master may allege, that in consideration, he permitted A, being his apprentice, to labour for the debt. so many days, at his request, he promised to pay, &c.

§ 3. An apprentice must *be by deed*, but a servant may be by *parol* contract. An apprentice cannot be assigned to an-

See Minors,
Master and
Servant,
Covenant,
Apprentice.
See Ch. 102.
1 Bl. Com.
426, 427.—
Com. D. 138.
—10 Mod.
144.—Doug.
70.—Stra.
1267.—
Mass. act,
Feb. 28, 1796,
sect. 5.—
1 Mass. R.
172.—Reeves
D. R. 341.—
Ld. Raym.
117.—1 Salk.
68.—

6 Mod. 182,
Queen v.
Daniel.—12
Mod. 553.—1

Mass. R. 172 to 180, Hall v. Gardner.—Reeves D. R. 341.

other master by a former one, he having a mere *personal* trust; and where the plt's. declaration states the master's title to the services to be by deed, the plt. cannot prove them by *parol* evidence. "This is the only contract which the common law required to be in writing." CH. 12. Art. 2.

§ 4. The difference taken as to an *apprentice* and *servant*, that the former must be by *deed*, and that the latter may be by *parol*, is said in *Regina v. Daniel* to be founded; 21 H. 6. c. 23. So that also an apprentice can be discharged but by *deed*, and that a servant may be by *parol*. Though it is generally understood that an *apprentice* may be by *parol* contract in Massachusetts, no case is recollected in which this point has been decided. 6 Mod. 182. —Salk. 68.—8 D. & E. 374, Barnes' Notes 57.

§ 5. And in 8 Term Reports it has been decided, that a contract of *apprenticeship* may be formed without using the term "apprentice," and by *writing* signed only. The word apprentice is taken from the French word "*apprendre*," to learn. And *parol* evidence was received to explain this written agreement, and some of the most material parts of it, and to prove some material facts not at all expressed in the writing. In this case there was *no deed*. 8 T. R. 379, Rex v. Inhabitants of Laindon.—1 East. 633.

§ 6. The master is entitled to what the apprentice earns, whether an apprentice *legally*, or only one *de facto*. Salk 68, Barber v. Dennis.

§ 7. So if the apprentice have a ticket or other writing, entitling him to money earned by him during his apprenticeship, this ticket or writing the master is entitled to; and if the apprentice die, and his executor receive the money, on either *assumpsit* lies against him by the master for so much money had and received to his use; per Holt C. J. 12 Mod. 415.—6 Mod. 60.—Sho. 562.—Co. L. 117.—Salk. 68,—

ART. 2. *Sundry cases and principles on which the action rests.*

§ 1. December 4, 1792, a boy under age bound himself an *apprentice* to the plt. for five years, to learn the trade of a potter. August, 4, 1794, *he left his master*, and entered into the deft's. service, who refused to give him up. The court held, that if the contract was *voidable*, which they doubted, "the mere act of quitting his master's service was not an avoidance of the" contract. Judgment for the plt.; for the deft. *harboured* his apprentice &c. But Ld. Kenyon and the court said, that every indenture of an infant is voidable at his election. 6 T. R. 652, Ashcroft v. Bertles.—Cro. Car. 179, 548.—6 T. R. 716.—Cro. Jam. 497.

§ 2. If an apprentice or minor binding himself, can avoid his contract at his election, yet going into the publick service by his master's approbation, is clearly no avoidance of them. *A fortiori*, if properly bound by a parent &c., the apprentice's going into such service by the consent of the master and parent &c. is no avoidance of the contract. 6 T. R. 557, Rex v. Inhabitants of Hindrimham.

§ 3. In this case a child had been duly bound as an ap-

CH. 12.
Art. 2.

6 Mass. R.
273, Commonwealth v.
Hamilton.—
3 Burr. 1434
—2 Stra. 982.

prentice in Upper Canada ; the master removed with the child into Massachusetts. The mother applied to the court to have her delivered to her, and a writ of *habeas corpus* was issued, and the court refused to order the child to be delivered to her mother, she having married a second husband, but allowed her to remain with her master, with whom she wished to live. It was urged on the mother's part, that the indentures made in Upper Canada were void here.

In Mitchell
v. Reynolds,
10 Mod. 138.

§ 4. An apprentice may bind himself not to set up and pursue his trade in a particular parish, for a reasonable consideration. This is not against the public interest, as he may pursue his trade in any other place.

5 East. 38,
Landsdown's
Case.

§ 5. An *apprentice* was *impressed* into the public service, who was willing to enter into it ; the court refused to issue a *habeas corpus* to bring him up at the request of the master, and said, that "if the party himself, being of competent years of discretion, do not complain, we cannot issue the writ on the prayer of the master, who has his remedy by action if his apprentice have been improperly taken from him.

5 East. 39,
Eades v. Van-
deput.

§ 6. This was an action against the captain of a ship of war by the master of an *apprentice*, to recover wages for the services of said apprentice, who, having been impressed, was detained on board the deft's. ship, who was informed by the apprentice that he was one. This was deemed sufficient to induce the deft. to make inquiries as to what the boy said. Judgment for the plt., the master. The tort of enticing may be waived, and *assumpsit* lies.

3 Maule & S.
191, 202.

5 T. R. 715,
Davis' Case.

§ 7. If an apprentice, of seventeen years of age for instance, bind himself for seven years, and in the contract, state he is fourteen years of age, he must be discharged at the age of twenty-one years. The court held, that "every indenture of an infant is voidable at his election, and in such cases the master must trust to the covenant of those who engage for the infant." It was, however, after this, as above, the court doubted if a minor cannot bind himself by his indentures of apprenticeship, the contract being evidently for his benefit. The authorities on the whole are clear he cannot.

It has sometimes been made a question, if a father, and after his death, the mother, can bind a minor child to a master so as to entitle him to its services, and if it leave his service to an action against the parent, merely by *parol* and not *in writing*. Very numerous are, and have been, the cases in which the contract has been *by parol only*, though it is laid down in some books, that an apprenticeship must be by *deed* ; yet this must mean only where certain statutes required a deed, as they sometimes do, and sometimes deeds by *indenture* ; for it is clear in the case of *Rex v. the Inhabitants of*

Landon, that an apprenticeship may be constituted by a mere writing and without deed; and it is settled in many books that a servant may be made, or bound by *parol*. There is no statute in this state that requires a mere writing in such cases, and where a mere writing is not required by any statute, it is no more binding when made, than a contract by *parol* is. It seems clearly to follow, that a binding by *parol* is valid in all cases, in which statute law does not require a deed or writing. Hence one of age may clearly bind himself, at common law, apprentice or servant by *parol*. So may the parent, his or her minor child, unless this binding out by the parent be an undertaking "for the default or misdoings of another," and so a case within the statute of frauds. But is the case of a parent and minor child within this statute. The statute speaks of the case in which A, for instance, undertakes for "the debt, default, or misdoings" of B. It goes on the ground of a debt, &c. and so supposes the person undertaken for, capable of contracting a debt. This is not, generally, the case of a minor.

CH. 13.
Art. 1.

Barr. Sett.
Cases, 12,
248, 578.—
1 East. 95.—
Com. D.
Justices of
the Peace,
B. 65.

§ 8. On the whole, the best opinion is, that this statute does not extend to these cases of parents and minor children, who have no capacity to contract or undertake, and to whom, failing to pay debts, defaults, and misdoings, are not properly attributable; but the engagement of parents in such cases, are properly their own concerns.

6 Johns. R.
274.—
Doug. 70.—
1 Ld. Raym.
688 —
Stra. 1267.—

§ 9. The master cannot send his apprentice abroad, but where such power is in the contract, or in the nature of the trade, or for the apprentice's health. If the master die, the executor cannot retain him, and the better opinion seems to be he is not bound to maintain him.

Salk. 64, 68.—
1 Sid. 216.—
Reeves D. R.
345.

CHAPTER XIII.

ACTION OF ASSUMPSIT. ARBITRATIONS AND AWARDS.

ART. 1. *General principles.* § 1. When parties submit to arbitration, there is an implied *assumpsit* in each to abide by the award. This is a remedy by the act of the parties, whenever the award is voluntarily performed; but if not so performed, and the party in whose favor it is made finds it necessary to resort to an action to enforce his former right or the award, his action is generally *assumpsit*, or *debt* on the award. This action of debt on the award, will be considered in Ch. 141. In this chapter I shall examine the action of *assumpsit*

ASSUMPSIT.

12. apprentice in Upper Canada; the master removed with the child into Massachusetts. The mother applied to the court to have her delivered to her, and a writ of *habeas corpus* was issued, and the court refused to order the child to be delivered to her mother, she having married a second husband, but allowed her to remain with her master, with whom she wished to live. It was urged on the mother's part, that the indentures made in Upper Canada were void here.

§ 4. An apprentice may bind himself not to set up and pursue his trade in a particular parish, for a reasonable consideration. This is not against the public interest, as he may pursue his trade in any other place.

§ 5. An apprentice was impressed into the public service, who was willing to enter into it; the court refused to issue a *habeas corpus* to bring him up at the request of the master, and said, that "if the party himself, being of competent years of discretion, do not complain, we cannot issue the writ on the prayer of the master, who has his remedy by action if his apprentice have been improperly taken from him."

§ 6. This was an action against the captain of a ship of war by the master of an apprentice, who, having been impressed, was services of said apprentice, to recover wages for the detained on board the deft's. ship, who was informed by the apprentice that he was one. This was deemed sufficient to induce the deft. to make inquiries as to what the boy said. Judgment for the plt., the master. The tort of enticing may be waived, and assumpsit lies.

§ 7. If an apprentice, of seventeen years of age for instance, bind himself for seven years, and in the contract, state he is fourteen years of age, he must be discharged at the age of twenty-one years. The court held, that "every indenture of an infant is voidable at his election, and in such cases the master must trust to the covenant of those who engage for the infant." It was, however, after this, as above, the court doubted if a minor cannot bind himself by his indentures of apprenticeship, the contract being evidently for his benefit. The authorities on the whole are clear he cannot.

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ass. R.
Comwealth v.
Milton.—
Burr. 1434
—2 Stra. 982.

to Mitchel
v. Reynolds,
10 Mod. 138.

6 East. 39,
Landsdown's
Case.

6 East. 39,
Eades v. Van-
deput.

3 Manle & S.
191, 202.

6 T. R. 716,
Davis' Case.

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6 Johns. R.
274.—
Doug. 70.—
1 La. Raym.
688.—
Stra. 1297.—

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Salk. 68, 69.—
1 Sid. 214.—
Reeves D R.
246

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CH. 13. Art. 2.

1 Saund. 20,
61.—2 do.
127.—8 D. &
E. 571.—3 D.
& E. 592.

3 Wood's
Con. 3, 8.—
5 Co. 78.—
1 Bac. Abr.
156, 83, 129.
—1 Burr.
277, Hawkins
v. Colclough.
—2 Stra.
1024.—Kyd
on Awards.


3 Wood's
Con. 3.—
1 Com. D.
523.—Kyd
on Awards, 8,
14, 22.—
2 Ld. Raym.
103.—Cro.
Car. 433.—
2 Mod. 73.—
1 Com. D.
519.—8 D. &
E. 139.—
21 H. 6, 30.
—8 Co. 81.
—4 Mod. 226.
—15 East
209.—
12 Johns. R.
397.—Bac.
Abr. 194.—
1 Rol. Abr.
244.
Kyd 20, 21.
—3 Wood's
Con. 4.—
Kyd 23.—
Cro. Jam.
447.—3 Leon.
53.—5 D. &
E. 9, Pearson
v. Henry.—
1 D. & E.
691, Barry v.
Rush.—7 D.
& E. 453.—
2 Mass R.
152.—3 Mass.
R. 235.—
3 Comb. 318.
—4 Cranch
347, Peisch v.
Ware.

on an award, and also the action of *assumpsit* on the original cause of action; though an award has been made, yet it will not support the first and bar the last, unless it be a good award: for there can be no action grounded on an award, unless it be a good one, and none but such a one can bar the former cause of action. It is therefore necessary briefly to see what is a good award, and how the action is affected by it.

§ 2. An award is as a judgment according to reason and conscience, "and must be taken liberally, according to the intent of the arbitrators," and not strictly, as other judgments are, and the award can be explained only by itself; and an arbitrator is defined to be "*Judex honorarius, non lege datus, sed ab iis qui litigant electus, qui totius rei habet potestatem ad arbitrandum, non ut lege, et stricto jure, sed prout ipse æquum esse existimet.*" To make the award good it must have the properties hereinafter mentioned.

ART. 2. § 1. *The submission must be by parties capable of contracting*, for they are bound by it; they contract to be bound; and every one who can release his right may be this party; for any one who can release his right may settle it by arbitration. Again the submission must be in form, but it may be by *parol*, or in *writing, conditional, or absolute, or general*, as to all matters in dispute, or particular, as to some one. But infants may be arbitrators, as they are of the parties, choosing, if they be capable, and have discretion. But a person of a *non-sane* memory cannot be an arbitrator, nor one who, by nature or accident, has not discretion; nor one who is not *sui juris*, as a slave; nor a *feme covert*; nor one attainted of treason or felony; nor can a man be an arbitrator in his own cause; nor one interested; he must know the law and be impartial.

§ 2. So B may submit for himself and D, and B is bound to perform, though D is a stranger. So a guardian may bind himself, that a minor shall perform the award. And so an administrator, as such, may submit; but if the arbitrator award less than is due to the estate, the administrator must answer for the surplus to the heirs; for the submission is his own act. But the practice now generally is for executors and administrators to submit to arbitration, especially by rule of court, and if they conduct fairly, the award of a sum of money or other thing, is so considered as in *auter droit*, and judgment accordingly; for in such case the award is viewed only as ascertaining the demand for or against the deceased's estate; only as reducing to a certainty what was uncertain, and not as creating any new debt or demand for or against the estate of the deceased. An award made on a submission entered into by mistake, is not binding, as where the parties thought they were bound to submit.

§ 3. Where the submission is by *parol*, the *plt.* must shew CH. 13.
not only that the parties promised to be bound by the award, Art. 4.
but that their promises were concurrent. 12 Johns. R. 397, 
Keep v. Goodrich.

ART. 3. § 1. The effect of a good award is this : if any 3 Cain. 258.
thing be awarded as a recompense for a wrong done, or for —1 Dall. 164.
something submitted, and this recompense be paid or perform- —1 Cain.
ed ; or if a thing be awarded to one for which he has a reme- 147.—
dy ; or if there be something as amends for non-performance, 1 Day's Ca.
as where there is a *bond* or an *assumpsit* to perform the award ; in Er. 130,
then the award operates as an extinguishment of the wrong or 134.
claim referred, and the prior cause of action passes in *rem ju-*
dicatam, so that if either party sue again for any matter in
dispute, on which the award was made, this, when pleaded,
will be a bar to the action ; as an award to pay money at a
day, not yet come, for here is an action for the money award-
ed ; and if the day be past, then it is a good plea to say he
paid or tendered, and so he must say ; but if the money award-
ed be not paid at the day, the party to receive has his election
to have an action on the award, or to sue on the first cause of
action ; practice is to sue the award.

§ 2. Again, "if there be a bare submission without *bond* or 1 Saw. 28.—
assumpsit, and the award be to do a thing, for which the party 2 Saund. 61,
to whom it is to be done has no remedy, as if it be a *collateral* 62, 127, 128.
thing, as to make a *feoffment*, or the like, or any thing else, —3 D. & E.
except the payment of money ; in these cases the party will 512.—Kyd
not be barred," in a suit on the matter submitted ; for he cannot on Awards 8,
have an action for the non-performance of such an award ; 18.—1 Ch. on
because *ex nudâ submissione non oritur actio*. This was the Pl. 80.—2 D.
old law, but now the very act of submission implies a promise & E. 646,
to perform the award ; and an action lies on such a submission. Malcolm v.
And now an action may be maintained on an award of a *collat-* Fullerton.—
eral thing, made on a *parol* submission. Hence *assumpsit* lies 4 Leon. 31.
against the party who revokes the submission, but not if the ar-
bitrators unreasonably delay the award. A submission of all
matters in difference between the parties in the suit is not con-
fined to the action.

ART. 4. § 1. How the award may be a bar, though not 1 Salk 69.—
performed, when it gives a new duty in lieu of the former, for 1 Bac. Abr.
a submission implies a promise to perform, so that the party 150, 151,
has a remedy for that which is awarded. But when the in- Freeman v.
tent of the award is not to discharge the old duty itself, and Barnard.—
give a new one, but barely to cause a discharge of the old du- 1 Ld. Raym.
ty, not by the award itself, but by a release ; the award is no 247.—1 Salk.
bar of the old duty ; as the referees only awarded mutual re- 76.—1 Sid.
leases, they must have found nothing due to either party. 160.—Keb.
If the award be to perform a *collateral* act, as to make a release 599, 600,
Pasloe v. Bal-
ley.—6 Mod.
221.—2 Ld.
Raym. 1039.

CH. 13.
Art. 4.

3 Wood's
Con. 4.—
Sid. 160.—
Keb. 600,
600.—Stiles
106.—Kyd
140.—
3 Wood's
Con. 4.—
Lev. 113.—
1 Sid. 160.

&c.; the old opinion was, that no action lay to compel a performance; but otherwise is the case in 6 Modern; and 1 Salk. 76; 2 Ld. Raym. 1039—is a bar though not performed.

§ 2. *The effect, a bond or an assumpsit.* If there be one or the other, an action lies thereon to compel performance, even of a collateral thing awarded, but the action is on the bond or the assumpsit; a collateral thing was deemed any thing but money. And if the award be, that a release be made, or other collateral matter be done, by such a day, and if not then done, he who ought to make it &c., shall pay a sum of money, this is good, even on a parol submission; for though there is no action or remedy on the award for the release or collateral matter, yet there is for the money, or on the bond or assumpsit, for not performing.

3 Wood's
Con. 44, 45.—
1 Com. D.
524.—Cro.
El. 223.—
1 Com. D.
524.—1 Bac.
Abr. 20, 21.
—4 Co. 1, in
Vernon's case.
—1 Com. D.
524.—1 Rol.
244.—2 Cro.
447.

§ 3. *The award's operation to change the property.* The award alters the property of chattels; as if the award be, that J. S. have a horse, in question between the parties, this gives him the horse, and he may have *detinue* for him; it operates as a grant. But as to a freehold, an award "neither gives a title nor binds a right," "because it cannot pass a freehold without deed." And as to a term, or chattel real, the award must be, "that the party shall have the term." A freehold estate or interest may pass from one to another by judgment of court and execution, but not by award; and no freehold or interest therein can be submitted, not even by deed; for it can be only to submit, and the award thereon can be no conveyance; and no collateral satisfaction can bar a real action. But if the submission be by bond, and the land awarded, and if the party refuse to convey, he forfeits the bond, and it may be sued. Nor can partition be made by an award.

§ 4. Where a freehold is awarded, *assumpsit* lies only in one case, that is, when the submission is by writing signed, for if by deed, an action of a different kind lies on it, and if by parol, the statute of frauds applies.

§ 5. The doctrine of construction, as to awards, has been essentially altered in a century and a half. Formerly the courts of law construed them with great strictness; but for more than a century past with great liberality; thinking that when parties end their controversies by the decisions of judges of their own choosing, these ought to be valid and effectual, if they can be by any fair and liberal construction; and further, that it is unreasonable to tie the common people down in their transactions, to the strict legal notions, critical and nice distinctions, of the bar and bench.

2 Wils. 148,
Wells' case,
A. D. 1762.

§ 6. It seems to be a rule in the English courts in debt on an award, and *nil debet* pleaded, not to allow partiality in the arbitrators to be given in evidence; for the court said the plea of

nil debet, primâ facie, admitted the award, and then the objection that such partiality made it void, failed. The court further said, that this evidence affected third persons, the arbitrators themselves; that "an award is a judgment, by judges chosen by the parties themselves, and a jury in a special verdict cannot find any matter, or fact, *dehors* the award. Hence nothing *dehors* the award, (as partiality is,) can be given to them in evidence. The evidence too would surprise the plt., and in this case, the court added, "in a trial at law, this matter of partiality and corruption, can never be got at." But in Massachusetts, where there is no court of chancery, the practice is different. And their mistake of the law in England, is allowed to set the award aside. In this case, it appeared by a paper the arbitrator delivered with the award, and which a majority of the judges viewed as a part of it, that he meant to decide according to law and mistook it, and his award was set aside. He divided the loss between two ships that struck each other at sea, by mistake in both, and one was much damaged and the other but little. Here it appeared in the award, the arbitrator mistook the law.

CH. 13.
Art. 4.

3 East 21,
Kent v.
Elstob.

§ 7. In ejectment for lands it appeared that three years before, a prior ejectment was brought against the deft. on the demise of the same lessor, for a part of the same land, being leasehold, and it was referred by bonds, and the referee "awarded the premises to be delivered up to Morris," but the deft. refused to do it, and retained possession. At the trial in 1802 the deft. was not allowed to go into the title. *Per Curiam*, "the award cannot have the operation of conveying the land; but there is no reason, why the deft. may not conclude himself by his own agreement from disputing the title of the lessor in ejectment. The parties consented, that the award of the arbitrator chosen by themselves, should be conclusive, as to the right to the land in controversy between them, and this is sufficient to bind them in the action of ejectment.

3 East 15,
Doe, lessee of
Morris v.
Prosser, A.D.
1802.

§ 8. The common practice in England of issuing attachments against a party for not performing an award, has never been adopted in Massachusetts, as the 9 and 10th of William III, c. 15, has not been adopted in this state.

§ 9. In this case *all matters in difference* were referred, and an award made. The court held, that the plt. might sue for a cause of action existing against the deft. at the time of the reference, on proof this cause was not before the referees, nor included in the matter referred; and the plt. was admitted by one of the referees to "prove that this matter had never been laid before them by the parties, and that they had not taken it into consideration." And so according to

4 T. R. 146,
Ravee v. Farmer.—See
147, note,
Golightly v.
Jellicoe,
cited 1 Phil.
Evid. 254,
255.—4 Esp.
N. P. 180.

CH. 13. Golightly v. Jellicoe, even after general releases awarded and executed.

Art. 4.

2 Sira. 1082,
Booth v. Gar-
nett.—
3 Wood's
Con. 3, 4, 6.
—Bac. Arb.
91.—1 Com.
D. 540.—
1 Bac. Abr.
151, 219.—
2 Wilson 148.
Salk. 76,
Parsloe v.
Bailey.—Same
case 6 Mod.
221, by the
name of Bois-
loe v. Bailey,
cited as law,
Bac. Arb. 90,
91.

2 Wood's
Con. 4.

Kyd on
Awards 8,
189, 190,
Phillips v.
Knightly.—
5 Co. 78.—
Cro. El. 432.

1 Com. D.
587, 540.

§ 10. When a *sum of money* is well awarded, all the books agree, that an action of *assumpsit*, or *debt*, as the case is, lies to recover this sum; that to give a note to pay at a *future day* is the same as money; and that an award not good in law is no award; and to support this action of *assumpsit*, the award must be good in all its parts; but the plt's. declaration need only state so much due to him on it, *inter alia*, but a plea must *shew the whole award*; *in debt on it, a mutual submission* must be shewn in the declaration.

§ 11. But when a *collateral* thing, as a horse, a release, a feoffment, &c. is awarded, the case is not so clear. The ancient opinion was, that no action lay to compel a performance. But in Salkeld, Holt C. J. held otherwise, against the opinion of Powell. This case was trespass, and in it is stated, that the opinion had been, that an award of a *collateral* thing in satisfaction was no good plea, unless the deft. shewed a performance; for they likened this to accord and satisfaction, which is no plea unless executed. Yet it was held, that when the award was of a *sum of money*, it was good, and that the reason of the difference which they went upon was, that there was a remedy on the award for the money, but not for the *collateral* thing. But Holt C. J. held, the law is now otherwise (3d of Ann) and that an award is a good plea whether it be of *money* or a *collateral* thing, as a hat or a horse, "*because the submission is a mutual promise upon which an action lies.*" And performance need not be averred in either case, for the remedy is alike. This opinion of Holt against that of Powell does not appear sufficient in itself to change the law in this respect, but it is stated in this case of Parsloe v. Bailey, that the law in the third year of Queen Ann *had been* altered; and it is now very clear that Holt's opinion in this respect is law. Award A shall execute a covenant to indemnify B is good. 2 Strange 903. And it is now settled, "that the assent of a party to submit a matter to arbitration is a sufficient consideration, even though he has no cause of action." 2 Ch. on. Pl. 80. According to the case of Samon and other cases, it seems by the old law, if the deft. in *consideration of 6d. paid him, promised to perform the award*, he was held, though a *collateral* thing was awarded, for he then *expressly promised* on a sufficient consideration, and *assumpsit* lay, and the question must have arisen when *he only barely submitted*, the idea must have been that he merely submitted, and did not *assume to perform*, but the award to be as a judgment of court, if good, and gave a *new* action, it was well; if *no new* action, the old one remained.

§ 12. Comyns states, that a *parol* award gives no remedy

for a *collateral* thing, as a release &c., and then states, that "if the submission be by *parol*, *assumpsit* lies for non-performance." But "otherwise, if a *collateral* thing is awarded and not money." CH. 13
Art. 4.

§ 13. These cases only shew, that if the submission, or award be by *parol*, no action lies on it for a *collateral* thing awarded. This may be true in a case where, by the statute of frauds and perjuries, the party is not bound but by *writing signed*, yet not to establish any general principle. On general principles the action on the award, for a *collateral* thing awarded, is clearly supported; for whenever one submits his disputes and matters to the judgment of others chosen by him, he is, on moral principles and in reason, bound to perform what he is awarded to do. It is trifling and making the submission and award a nullity, if he do not, and if there be no action. For money in many cases cannot be awarded; when he submits in such cases *the law will not imply* he means the whole a nullity; but will *imply he assumes to perform*; and for as strong reasons as it implies, which is the case, a party to a judgment assumes to pay it; and if he ought to perform, the law on well settled principles will presume his *assumpsit* to perform. And if later cases do not wholly confirm, they tend very strongly to confirm this doctrine. 3 Bl. Com.
156, 159.

§ 14. But this reasoning does not hold, when the award itself cannot *extinguish the old cause of action*, as when this rests on a *superior* title; as where I have a *freehold* estate, a debt due to me on a *specialty*, or a *judgment*, and submit it, as the award itself cannot *extinguish* my right to either, but my action thereon will remain till I give a deed or a release, the law will not imply I assume to perform, unless it be to make a *deed* or a *release*, or do some other act awarded, which, when done, *extinguishes* the right. If this be done, the award *ascertains* what *I am* to do, that is, to convey my *freehold* or *extinguish* such my old right by my *deed*; this being done, the award answers a legal purpose, and as I ought by my own submission to do so, why may not the law presume I promise to do so? But if the award, when performed, leaves the *old right existing*, there is no ground for such a presumption. So many cases may be reconciled.

§ 15. When the award *itself* extinguishes not a *specialty*, debt, &c. "It appears by all the books, that neither *award* nor *accord and satisfaction* is a good plea in bar when the action is grounded on a *deed*," and a *certain duty arises from it*, as a sum of money &c.; but otherwise, when it arises *not from the deed only*, but on a *subsequent default also*, as on a *covenant to repair and default in not repairing*, here an award is a good bar. Bac. Arb. 22.
—6 Co. 43,
44, Blake's
case.

CH. 13. § 16. *A good award only bars the old assumpsit, or gives*
 Art. 5. *a new one.* The many and various defects that make an
 award bad cannot here have place in detail.

Bac. Arb. 11. Whenever an award is made, it is ready to be delivered; and
 —5 Co. 78, this delivery need not be averred, Salk. 69; and if refused on
 Sampon's case.—Bac. request, this must be pleaded.

Arb. 123. An award must be pleaded according to its *legal effect*, and
 Bac. Arb. 99, a *void* part need not be pleaded, for the void part is not part
 100, 194, 197. of the award, and may be treated in pleading generally, as
 though it never existed.

Sta. 116. ART. 5. *General principles necessary in every award.*

Henderson v. First, the award must be "made in respect to persons and
 Williamson. things according to the submission," as well in form as sub-
 stance.

—2 Stra. Second, it must "be beneficial and *appoint something advan-*
 1024, Ormsett *ageous to each party.*" Award good without date, 2 Ld.
 v. Breame.— Raym. 1076.

1 Ld. Raym. § 3. Third, it must "be *possible* and *lawful.*" Fourth, it
 611, Clap- must "be *certain* and *final.*" Award one party accept a thing
 cott v. Davy. does not oblige the other to deliver it. Where an award cannot
 be corrected after delivered, 8 East 54, Irvine v. Elnon.

2 T. R. 644, § 4. *Umpire when appointed.* He has power to award
 Roe v. Doe. costs as a necessary consequence to his authority, though not
 expressed; and he may be appointed by the arbitrators before
 they enter upon an examination of the matters referred to
 them; but Salk. 70, Holt C. J. held, the appointment before
 the time expired for making an award by the arbitrators, void.

2 Barnes' § 5. Where *three arbitrators, or the major part of them* may
 Notes 53, 57. award, all ought to be together; for though two only may sign
 —Bac. Arb. the award, yet the reasons of the third in the meeting and
 10, 194.— hearing may alter the opinion of the other two, therefore he is
 Willes 215, not to be excluded by fraud, but if he have due notice of the
 Dalling v. meeting, and will not attend, the meeting of the two is regular,
 Matchett.— and their authority sufficient, otherwise if he had no notice to
 Cro. Jam. attend. 1 Johns. Ca. 334.
 277, Sallows
 r. Gerling.

Bac. Arb. § 6. An award that directs any thing to be done to a *stran-*
 12, 97, 98, *ger*, is good only when there is a remedy in law or equity to
 101 to 105, compel performance of it, or only when the *stranger* is made a
 135.—10 Co. *mere instrument, as a trustee to a party, or when he is connected*
 13.—Rol. as the *servant, or a near relation of the party &c.*; in either
 Abr. 244, of which cases the thing to be done is in substance to the
 247, 248.— *party.* So it is good when any thing is awarded to be done
 Dyer 242.— by a *stranger*, only when there is a remedy to compel a per-
 1 Salk. 74, formance of the thing awarded to be done. But an award
 Bird v Bird. that one party make an estate for life to the other, *remainder*
 —Cro. Car. in *fee* to a *stranger*, is void as to the *stranger*, but good as
 433.—Cro. to the *particular* estate or party. 1 Wils. 28, 58.
 El. 66, 758.—
 Bac. Abr. 99,
 105, 135,
 Gray v.
 Wicker.

The place of making an award is substance to be averred. All the arbitrators must sign if not otherwise provided for. 6 Johns. R. 39.

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Art. 6.

§ 7. A submission is made by A, as attorney to B, as to accounts between B and C; this binds A the attorney, and not B his principal, for he is a stranger to the award and submission; and if the award be that A the attorney, pay C £400, and C and the attorney make mutual releases, it is bad and not mutual, for the attorney refers the business of another, and a release to him is no release to his principal B, and so no bar to any demands C may have against B. So if B is to pay the £400, he is to have nothing for it; otherwise had the release been awarded to the attorney to the use of B his principal. But A may submit for B.

Salk 70,
Bacon v. Du-
berry.—
13 Mod. 120,
130.—Bac.
Arb. 96, 97.
—1 Com. D.
626.—1 Ld.
Raym. 246.
—Comb. 129.
—2 P. W.
449.—3 Wils.
28, 68, Cay-
hill v. Fitz-
gerald.

§ 8. An award pleaded to be *de et super præmissis* is not enough, it must appear to be so in itself.

§ 9. So money paid on a void award, and accepted, may be good, and pleaded as accord and satisfaction. And if an award be to A, as attorney to B, A may sue in his own right, for this makes A trustee to B, and entitles him to recover to his use.

8 T. R. 571,
Bansel v.
Leigh.—
Knight v.
Burton, Salk.
74.
Simon v.
Gadd, Bac.
Arb. 142.—
1 Com. D.
636.

Final. An award that all suits shall cease, means forever, and is final. So that if a suit in chancery be dismissed, so that the plt. retract his suit, for then he cannot sue again for the same thing; but not that he be *nonsuit* or *discontinue*, for then he may commence another action for the same thing.

§ 10. A *parol* award may be pleaded ready to be delivered, and there may be an *oral* as well as a *manual* tradition. But the judges will now "rarely enforce the performance of an award, when either the submission or the award is by *parol*, because it lays so great a foundation for perjury." All doubts are those of the parties, not any the referees may have.

Salk. 75,
Oates v. Bro-
mil,
6 Mod. 176.
—Bac. Arb.
20, 88.

§ 11. In this case it was decided, that where A brought two actions against B, which they referred, the referees could not report any thing to B, except costs in those actions; no demand being brought into view on his side, but for costs in these actions.

4 Mass. R.
448, Worthen
v. Stevens.

ART. 6. *An award, when certain or not.* § 1. An award that one party pay the other £10, and the costs of a suit now depending in an inferior court, and then to give mutual releases, is uncertain and bad; but to pay such costs as the master shall tax, is good, for that is certain which can be reduced to certainty. In the first case there is no rule of calculation, in the second there is. 2 Ld. Raym. 1141, Bill v. Gipps.

Salk. 75, Win-
terr. Garlick.

§ 2. But an award to pay as much as such lands are worth, is uncertain and bad; there is no way to ascertain this.

Cro. Car.
383.—Stra.
1066.—Skin.
248.

§ 3. So an award to pay as much as is due in conscience, is uncertain and void, as it does not even appoint a

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Art. 7.

Style 28.—
2 Saund. 292,
Pope v.
Bratt.—Bac.
Abr. 142, &
Winter v.
Garlick,
above.—See
5 Wheat.
304, 412,
Lyle & al. v.
Rodgers.
Bac. Arb. 14,
111, 112, 141,
146, 147.
Bac. Arb. 14.
—Style 44.

Bac. Arb.
147.

Cro. El. 904,
Cotston v.
Harris.—
1 Com. D.
540.—Bac.
Arb. 11, 14,
112, 141, 146,
148, 152.

Hob. 49, 50,
Nichols v.
Gruunton, &
445.—7 East

way to find what is due. The award must be certain and decisive. But when the words of the award have relation to things certain out of it, these things may be averred; for this is the express mind of the arbitrators, which they have expressly referred to. And thus by referring to a thing *dehors* in making the award, the thing is made a part of it, and that being certain, the whole is thereby made certain; and there is certainty in awards, as in other cases, whenever the case comes within the rule of *certum est quod certum reddi potest*. *Barry v. Rush*, 1 D. & E. 691.—*Ross v. Hodges*, 1 Ld. Raym. 234.

ART. 7. *Mutual or not.* § 1. "An award must be mutual, and appoint something advantageous to each party," or it is bad. As where it awards that one party go to Rome, when this can be of no advantage to the other, it is void. But a penalty or a release may be awarded.

§ 2. So an award is void, and on one side only, when it is awarded that A, one party, pay B, the other, £10, and that B pay for making the writings of the award; for B is to do nothing but make the writings. This is an old case.

§ 3. So one takes my cattle by trespass; an award that I have them again is no satisfaction for the trespass, as nothing is allowed for the injury done.

§ 4. *Assumpsit.* The declaration recited, that whereas certain disputes existed between the plt. and deft., as to tithes, and they referred the matter to J. S., to award concerning the premises, and in consideration of 6d. given by one party to the other, the one assumed to the other, to stand to the award of J. S., or to pay 10s.; and alleged that J. S. awarded that the deft. should pay the plt. 40s. for the tithes at such a day, and that he had not paid it, *per quod actio accrevit*. *Non assumpsit* was pleaded, and a verdict found for the plt. On motion the court held the award was void, because it was awarded the plt. should pay 40s., and nothing was awarded for him to have, or to be free from suits. So he has no advantage by the award, by way of payment to him, or by way of discharge, or in any other manner, or no consideration for what he is awarded to perform.

§ 5. What is awarded to one must be a benefit to both, "so as to end the controversy, and discharge one, as well as give satisfaction to the other." Something may be due to one party only; but then this is a duty from the other, and if it remains as before, notwithstanding the award, it is evidently on one side; but this discharge may by the award be expressed or implied, and either way it may be a benefit to the party discharged.

§ 6. Debt on a bond conditioned to perform an award to be

Bospoole's case, 8 Co. 193, 194, 198.—*Cro. Jam.* 200, 278, 355.—8 East 13, 445.—7 East 81.—*Willes* 270.—*Cro. El.* 838.—*Lutch* 545.

made in writing ; plea no award ; plt. shewed one upon, and concerning the premises in writing, that the deft. depart from the house where she lived &c., and pay the plt. £3 10s., which was not paid. The deft. rejoined, no such award. Issue and verdict for the plt., but the court held that this award was not mutual, but on one side only, and so void ; for it must end all disputes appearing to the court, or it is not according to the submission ; and as the dispute is between two parties at least, it cannot be ended, except in respect to both, expressly or impliedly. An award that an obligor pay a single bond, is bad, except it also be provided he be discharged ; for payment is no discharge of a single bond. But an award that he pay £10 for a trespass is good, for here is a satisfaction expressed, and that implies a discharge. In this case it is not said for what the £3 10s. is paid, and nothing is awarded for the deft.

CH. 13.
Art. 9.

§ 7. If A of one part, and B and C of the other, submit all matters between them ; this is all between A and them jointly, and between A and each of them, and the award must be delivered to all three of them.

Comyna' Rep. 647.—
Bac. Abr. 93.
—5 Co. 103.

§ 8. A for himself and B his partner, submitted, and an award was made that they pay monies &c. ; though B is not bound, yet A must perform the award, for A has undertaken for B, and bound himself as far as he did not bind B. Awards construed joint or several, two one side, one the other.

2 Mod. 227,
228.—
Bac. Abr
96, 96.—Rol.
Abr. 244,
Bullock v.
Dally.—
7 D. & E. 362.

ART. 8. *An award when certain by relation to something dehors.* See the case above of Winter v. Garlick.

§ 1. So a submission of all disputes as to a voyage. The award was, "that one should pay his part of the charges of the voyage, and should allow his proportionable part of the loss that shall come to the ship by the voyage, on account." This award is good, though of itself uncertain ; for it may be reduced to a certainty by reference to a thing certain, as the party's part of a certain voyage ; but then what is his part must not be in dispute. Hence the thing *dehors*, referred to in the award, must be certain and settled ; because in this the minds of the referees are known and expressed only by this thing's being certain, or by a mere ministerial act in reducing this thing, as the costs of a suit, the charges of a voyage, to a certainty ; hence the thing referred to, as these costs or charges, become a part of the award, and may be averred as though contained directly in it. So to pay one's part on an account, if there be no dispute as to it.

1 Rol. Abr.
261, Beal v.
Beal.—Bac.
Abr. 183.

§ 2. In an action referred, the referees have power over the costs, as incident to the damages or debt referred to them.

ART. 9. *Referee Act of Massachusetts of July 7, 1786, and cases decided on it.* § 1. The fifth section of this act provides, that referees appointed under this act, "shall be vested with

1 Com. D.
635.

2 Mass. R.
164, Nelson
v. Andrews.
Mass. Act Ju-
7, 1786.—
Laws of
Maine, Ch. 78,
pp. 291, 292.

CH. 13.
Art. 9.



Fowler v.
Bigelow &
ux., 8 Mass.
R. 1.

1 Bos. &
Pul. 91,
175.—1 Com.
D. 522, At-
kinson v.
Abraham.
1 Mass. R.
158, Drew v.
Canady.—
14 Mass. R.
43.

1 Mass. R.
411, Durill v.
Merrill, in er-
ror; and
6 Mass. R.
489, 524.—
5 Mass. R.
189, Mott v.
Anthony;
524, South-
worth v.
Bradford.

3 Mass. R.
324, Bullard
v. Coolidge
& al.

3 Mass. R.
396, Mans-
field v.
Doughty;
but 14 Mass.
R. 262, 264,
enough it be
in his hand
writing.
4 Mass. R.
242, Tudor v.
Peck, in er-
ror.

all the authority and power that referees have been, or may hereafter be vested with, who have been or shall be appointed by rule of court." And by the third section, the court shall have cognisance thereof, "in the same way and manner, and the same doings shall be had thereon, as though the same had been made by referees appointed by a rule of the same court." This act extends to "a dispute of what nature soever," between the parties. But the fourth section seems to extend to, or contemplate money only. This act does not extend to title to freehold estate. By this act the rule is entered into before a justice of the peace.

§ 2. In this, as in other cases of award, it is no objection the witnesses are not sworn before the referees, if the party do not require it at the time; nor that they alone examine any of them, if not by the influence of the party.

§ 3. On the above act there have been several decisions. In this case it was decided, that the justice of the peace, who takes the acknowledgment of the parties to the rule, cannot be one of the referees. How a partnership demand must be signed &c.

§ 4. The report of the referees on this act, must be made to the court of Common Pleas, holden next after the award made; and if the court had commenced its session previous to the making the award, the report of the referees cannot be returned and accepted at that term. And if it be so, it is error; for by the words of the act, the report is to be made to the court holden next after the report is made, and if not so made, the submission is void. See 14 Mass. R. 148, 149, Walker v. Melchor—all must hear.

§ 5. In this action it was adjudged, that there must be a demand annexed to this rule, entered into before a justice of the peace, and if there be not, it is error. This demand annexed is required by the words of the act. Where no review on such a report, 14 Mass. R. 360.

§ 6. In a writ of error brought in this case, it was held to be error, if the demand annexed to the original submission be not subscribed by the person making it. This being a special jurisdiction in derogation of the common law, must be strictly pursued, in which case nothing is to be understood, but what is apparent.

§ 7. In this case, on a writ of error, the court held, that the report of the referees on this act must be confined to the matters contained in the agreement of submission acknowledged before the justice, and if there be several rules between even the same parties, there must be several reports; nor can the parties, by their after agreement, extend the rule properly acknowledged, to matters not contained in it; and any agreement to this purpose is void, not acknowledged.

§ 8. Cook in this case had demands against Daniel and Amos Whitney, *partners in trade*. Daniel and then Amos died, and the plt. in error administered on the estates of Amos and Daniel. The parties submitted all demands Cook had against the said deceased partners, or either of them, and all demands they, or either of them had against Cook. The court re-committed the report of the referees; and they in the *same* term reported there was due from said Amos' estate, *surviving partner*, in his administrator's hands, \$1002, with costs of court; and said Whitney to pay costs of reference.

CH. 13.
Art. 9.

5 Mass. R.
139, Whitney, adm. in error v. Cook.

§ 9. The court observed, that two objections were made. First, that the report was not made to the next court &c. This objection was overruled; for after the recommitment, the parties had day in court, and the amended report might be made at a succeeding term, *during which* the referees shall have agreed upon it.

Second objection, that it was not competent for the parties to submit these *several* demands by one rule before a justice, that is, of Cook against *two* estates, of Daniel and Amos Whitney, on which the plt. in error, had taken separate administrations. But this objection also was overruled. In this case the court said, this was a kind of action, but not pending in court; all the report was made to the court; and that it had power to recommit; and that all the demands submitted were demands between the *same* parties, and that a rule of this kind is provided for by the statute; that Cook's demands were against the *partnership*, and these "he could substantiate against the administrator of the *surviving partner*;" and the costs to be paid by the administrator must follow the damages, which are reported to be a charge on the *partnership fund*. Judgment affirmed with costs for the deft. in error, in this the referees settled the costs of reference; and so is the practice in Massachusetts generally.

In this case the court held, that the plt.'s demand annexed to the rule must shew on what account, and for what cause the demand was made. And if the court reject the report of the referees, for want of power in them, the court cannot award costs; for when it rejected the report for want of authority in the referees, its power over the cause ended.

5 Mass. R.
264, Jones, plt. in error, v. Hacker.

§ 10. On such a justice rule, all the referees must hear the parties, though a major part only may report; and a *writ of error* lies on the judgment of court on such a report; and if two only sign the report, it must appear by the record that all the referees heard the parties.

6 Mass. R.
496, Short, plt. in error, v. Pratt.

§ 11. This was a report on the referee act; held, the court may recommit it in the *same* manner as one made on a rule of court. If the referees on this act report a certain sum due

6 Mass. R.
70, Boardman in error, v. England.

CH. 13. to B, a party, the Common Pleas may legally enter judgment
 Art. 10. for a less sum, B releasing the difference on the record. 14
 Mass. R. 252, 253.

Bac. Arb. 27.
 —Bac. Abr.
 133.

ART. 10. *Mutual releases.* *The time of the submission is, or should be a known fact.* So of the award. Nothing can be submitted but disputes and matters between the parties, *at the time of the submission.* This is clear; and as the award must pursue the submission, and can be valid only as it embraces matters in it, it is clear, the award is void, as to any matter *arising after the submission*, except costs and interest, and some such things *as depend on the matters referred*; as if the submission be of *ewes with lamb*, which ewes *after* the submission, and *before* the award have lambs, no award can be made touching the lambs; for they were not in being at the time of the submission.

Bac. Arb. 138

2 T. R. 645,
 see Willes
 62.

Moore 3 pl.
 8.—Bac. Arb.
 28.

§ 2. So where the dispute is about land, the award may embrace rents accruing after the submission, as things in substance included in the principal matter submitted: and now even in England *costs* attend the submission on the same principle.

§ 3. So an award is good, that A, one party, make a lease to B, the other, and that B therefor pay A £10 yearly.

§ 4. Arbitrators can make but one award; and that must be strictly within the time allowed. They can have no power to award a release of any matter, action, or cause of action, accruing *after* the submission. This point has been agreed at all times, and the question has been, how to consider a release awarded, so as to include such matter after the submission, or any award embracing such matter. At first it was held, that *awarding releases to the time of the award was void*, as including more time than was submitted; then, that it should be averred that no *new matter* did arise between the submission and award. And finally, if releases be awarded to the time of the award, it is good, because no new matter of action shall be intended in the *interim*, if not shewn by the party objecting to the award on this account; and because, mainly a release to the *time of the submission* is a good one, and one is void, so far as it respects any matter, action, or demand arising *after* the submission. And if an award have no date, the date as in the case of a deed is the delivery of it. Hence, a submission was of "all controversies pending," and the award was, "that all suits *now* pending between the parties shall cease;" and that the deft. pay the plt. £10, in full of all demands, and release all demands to *the time of the award*, and on the payment of the £10 the plt. should release to the deft. &c. The court, on error brought, held, that an award of a general release of all demands, till the time of the award, is good; for nothing new shall be intended to have arisen in the mean

Salk. 76.

time; and if any *new* demand or controversy did happen in the mean time, the award, as to that *new* demand or controversy, is void," for that was not submitted. "And it is a good performance to tender a release of all matters in controversy to the time of the submission;" this is all he is bound to do, and *new* matter is not intended if not shewn in pleading.

§ 5. In a similar case of a submission, July 29, and an award made August 8, the court held, the whole award was void. In this case the award was, that the plt. have a horse in dispute, and £3 paid him by the deft. for costs and *mutual releases*, including about two months after the submission; the action was for the £3, and on demurrer the court held, that though the award was *on, and concerning the premises*, and *no new matter shewn*, yet it was void, as to the releases, the plt. not shewing there was no new matter; and these being void, there is nothing awarded for *the deft's. benefit*, so all on one side and void. But 2 Cro. 578 there was a contrary intention, and so Cro. El. 858, and so other cases.

§ 6. So *assumpsit* for 40s. awarded, and verdict for the plt., it was moved in arrest of judgment, that the award was void, as it was made of more than was submitted, as only actions at *the day of submission* were referred, and the award was of controversies at *the day of the award*. But the court held the award was good, as it is *of and upon the premises*, the things submitted; and though the award seems to extend to more, yet the words, *upon and concerning the premises*, restrain it to the thing submitted, and this is according to the best authorities.

§ 7. Where the award is *on the premises*, and the releases are general, and come down to no particular time, it shall be intended they were awarded only to the time of the submission, and so the award is good.

§ 8. An award, that all actions are to cease amounts to a release. The intention of the arbitrators is clear, and the form is not material. Their award operates like a judgment to bar and bind the parties.

§ 9. If two partners refer all matters in difference between them, the referees may dissolve the partnership between them.

§ 10. An award that orders partition, but orders no deed to be given, is void. No partition of land can be made without deed, by statute law. In this respect, an award is not like a judgment.

§ 11. On the whole, the above case from Salk. 76, must now be considered as law, and the old cases to the contrary, as not law. These rested on a very erroneous principle; in them noth-

CH. 13.
Art. 10.

Bac. Arb.
119, 120.—
Salk. 174, Si-
mon v. Gaud.
Cro. Jam.
352, 358,
Stain v. Willd.
—Cro. Jam.
448, 578, 664.
—Cro. El.
858.—Cro. El.
861.—Hob.
191.—10 Co.
132.

Cro. El. 861,
Goodman v.
Fountain.

3 Lev. 168,
Robenet v.
Cobb.—Bac.
Arb. 118.

Barnes 43.—
Bac. Arb. 129.
—5 Co. 78.

1 W. Bl. 676,
Greene v.
Waring.

Willes 248,
Johnson v.
Wilson.

CH. 13. ing was intended in favour of the parties' own acts, amicably
 Art. 11. to settle their disputes.

2 Wils. 293,
 Addison v.
 Grey.

2 Bos. & P.
 371, Aubert
 v. Magee.

ART. 11. *Awards void in part.* § 1. It appears in art. 9 above, and in the books, that many awards are void *in part*; hence, an important question arises often, when does the *void part* vitiate the whole award. The rule is, that when the *good part* and the *void part* are distinct and *independent*, the good part will stand in force. But when any thing in the *void part* enters into the consideration of the good part, and so these good and bad parts are blended together and not distinct, the whole award is void. Award set aside for a bad debt included, good for the rest.

2 W. Bl. 1117,
 Pickering v.
 Watson.

3 Lev. 414.—
 Bac. Arb.
 J20, Bargrave
 v. Atkins.—
 2 Cain. 235.
 —5 East 139.

Willes 64,
 Chandler v.
 Fuller.—2 T.
 R. 644.—
 1 H. Bl. 223.
 —2 W. Bl.
 1117.—2 D.
 & E. 644.—
 8 East 13.—
 1 Bin. 61.

§ 2. As in a submission of all matters, so that the award be made on the premises, and at an after day the award is made, that one release all matters to the *time of the award*, and the other pay £10; here is an award *prima facie*, both sides, but the releases being void, the whole award is so, for the release was intended as a part of the consideration; but now as the release would be held good for all matters *before the submission*, the award would be viewed as mutual and good.

§ 3. An award that the deft. pay the plt. £7 10s. and the costs of a suit, the plt. had against the defts., and thereon *mutual releases* to be given, the court adjudged that this was a good award as to the £7 10s., and void as to the costs, as to them being *uncertain*; and that on payment of the £7 10s. each party ought to release, and not wait for the performance as to the costs, as to which the award was void. In this case the costs were a distinct article, and for the award to be good in part, that part must be distinct and independent. The arbitrators may award the plt. his costs, and also award costs of reference to be taxed by the proper officer, and if the officer tax the former, the award will be good for the plt's. costs, and bad for the costs of reference. For it is clear the referees cannot award costs of *reference*, though they may the costs of the *party* by the English law. See *Whitney, adm. v. Cook*, above.

Bac. Arb. 183,
 134, 145.

§ 4. Submission to the award of A, so that it be made at, or before April 30; he made one April 30, and awarded that the parties within four days release to each other to the *time of the submission*, but that if either be discontented with the award, and by May 20 pay the other party 10s. then it should be void. The court held this was a good award, and that the last part only was void, for the proviso to make it void, after the executions of the releases is repugnant, but if this avoiding proviso had been *within the four days*, the award would have been void, as it would have been no final end of the dispute.

Poph. 16.

§ 5. An award, that one party assure lands submitted, to the other and *his wife*, is void as to her, as she is no party, and the assurance must be to the husband alone.

CH. 13.
Art. 12.

§ 6. The courts of law formerly looked critically into awards, but in modern times they give them a benign construction; and now, if an award be *certain in part*, as in regard to £20 damages, and *uncertain in part*, as in regard to costs *unascertained*, the party may shew the award in his plea, and assign a breach in the non payment of the £20 only; and he shall have judgment, for he may give up the bad, and rest on the good part. Costs, *prima facie*, mean legal costs.

Bac. Arb. 159.
2 Wils. 267,
269, Fox v.
Smith, and
298.—1 Burr.
277.

§ 7. So if *all actions for tithes* be submitted, and the award be that *all actions* cease, it is a good award; for it is intended there is no other action unless they be shewn, and the award is good for what is submitted, and void for the rest.

1 Com.D. 531.
—2 Cro. 664.

§ 8. Debt on an arbitration bond. Plea no award. Replication, an award made, that the deft. pay the plt. 25s. April 1st, and 25s. to each referee May 1st; and on the payment of said monies, *mutual releases to be given to the time of the award*. The court held, this award was good as to paying the 25s. April 1st, and void as to the 25s. to each referee. And as to the release, that it was void, so far as it exceeded the submission; and that the releases might be to the time of the submission. This difference must be taken, that the justice of the award be not affected by the void part being rejected. And if the whole will be unjust by rejecting the void part, the whole must be set aside.

Glhb. Cases,
118, 120,
Abrathut v.
Brandon, and
pp. 126, 127.

§ 9. Though the plt. refer *all matters*, he may sue any matter, on proof it was not laid before the referees; but then, the referees must not, intentionally, omit any matter referred. As where they decided all matters but one, and gave liberty to one of the parties to prosecute the matter, if he chose. In this case the award was deemed bad *in toto*, though the excepted matter be excluded from the releases. But the referees may except a certain thing not in dispute, as a note, that it shall stand and be paid.

4 T. R. 146.
Ravee v.
Farmer.
—Wilkes 368,
Bradford v.
Bryon.

ART. 12. *How awards may be performed*. On a view of all the cases, it appears that an award to pay money in the house of a *stranger*, if not a tavern or coffee-house, is bad; but *at the house* is good; for they may pay *at his house* and not be trespassers.

1 Bac. Abr.
126, 127.—
5 Ins. Cl.
2 B.—1 Com.
D. 526.

§ 1. There must be a *demand* of the thing awarded, and *tender and refusal* has the same effect in awards as in other cases; and when one party tenders his part, he has a right to have what the other is to do to, or for him. As if one tender the £10 he was awarded to pay, he may sue for the release

Salk. 83.—
Bac. Arb. 127,
160, 128.
1 Rol. Abr.
264, 265, 267.

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Bac. Arb.
179.

Salk. 75.

Bac. Arb.
135, 221, 222.

Bac. Arb. 136.
—3 Lev. 18,
413, 414,
Bargrave v.
Atkins.
Winter v.
Garlick, a-
bove.—Stra.
737, Dudley's
Case.—
Oatis v.
Bromil,
4 East. 584.
5 Co. 77, 78,
Samon's
Case.—
2 Stra. 1024.
—Cro. Jam.
314, Thinn v.
Rigby.—
1 Lutch. 550.
Ro. Abr. 263.—
Bac. Arb. 131.
—1 Lev. 88.
—Ld. Raym.
124, 234.—
12 Mod. 535.
—1 Cain. 319,
304.—2 Cain,
327, 235.—
9 East. 436.

Salk 75 —
Mod. Cas.
195.—
Barnes 56,
166.—3 Lev.
18, 414.—
2 Wils. 268.
—Stra. 737,
1025, Keott
v. Long.—
2 Vent. 243.

the other was awarded to make to him, though the release was to be made on the *receipt* of the £10.

§ 2. An award will not be enforced when obtained by fraud or concealment of a party, or by corruption or partiality of the referees.

§ 3. And if one, who is to receive money, refuse it on a tender, he is as much bound to sign a release, as if he actually received it.

§ 4. Where costs are awarded, they are as between *party and party*, and not as between *attorney and client*, unless the referees expressly so award; as that the plt. have all his expenses, or use other words, shewing they mean he shall have his *actual* costs. In pleading a tender of the performance of an award, *ad hoc paratus* is not necessary to be pleaded. Some books, however, are otherwise.

§ 5. Costs may be ascertained by the plt's. bill given to the deft; but an award that the deft. pay the plt. £71 10s., and *all reasonable expenses* sustained by the plt. about his said suit, is *uncertain and void*. But since where it was awarded that the plts. pay the costs, and no one appointed to tax them, the court supplied it by ordering the master to do it. A *parol* award may be pleaded ready to be delivered, &c. Salk. 75, and sufficient if only made.

ART. 13. *When awards are certain and final, or not.* § 1. A and B submit all disputes as to lands, and award that A enjoy it, and that B give him a bond, is void; for the sum of the bond is not named, and there are no data on which to find it. And every award ought to be certain, that the party may know what he has got to perform. 1 Day's Ca. in Er. 130.

§ 2. Two persons submit controversies, as to the right, title, and possession of 200 acres of land, called *Kelstom Linge*,—award, that in the waste lands of the town of *Kelstom*, one shall have the brakes, there growing, during his life, paying to the other 2s. a year, without giving any name to the land in the award; this award is void, and cannot be helped by averment, that the brake land is the 200 acres submitted, and not other land; for the party cannot expound the intent of the arbitrators, whose office it is to end all differences directly, or by reference to something certain. Costs of reference, also, are included in costs to abide the event. 9 East. 436.

§ 3. By all the above cases in regard to costs or expenses in the sixth and eleventh articles, the rule seems to be, that if *costs of court are meant*, they shall be taxed by the proper officer, and so reduced to a certainty by a mere *ministerial* act; but if not such costs, but *expenses generally*, they are *uncertain*, and the referees must reduce them to certainty, or the award as to them will be void. Award, certain actions be discontinued, and each pay his costs is final. 9 East. 497.

§ 4. *What is a certain and final award or not.* An award is good, that one party pay £105 to the other by such a day; and if then not paid, £110 by such a day; for it is but a *penalty* for the non-payment at the day, all which is in the arbitrator's power. *Bac. Arb. 70; 1 Com. D. 585; 1 Rol. Abr. 250; Cro. Jam. 534; 1 Keb. 335; 2 Keb. 670, 838; 2 Mod. 238.*

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§ 5. So an award is good that one party enjoy the land three years, and pay so much rent every 6 months; and on failure to pay, the award for enjoying the land to be void. To pay debts named in moieties is good.

Cro. Jam. 423, Furser v. Prowd.—2 Atk. 601.

§ 6. It is enough the award agree in substance with the submission, but the intentions of the referees must be expressed or implied in their award itself; and if not so, no intent can be averred; but this intent may be expressed in the award itself, or in any paper made a part of it by reference, as in *Beal v. Beal, Winter v. Garlick*, and other cases.

Bac. Arb. 84.—Dyer 242.—Plow. 396.

§ 7. A question then often arises, if the award be according to the submission in substance. Cases. The submission was of right and interest in land, and the award was of the profits. Adjudged this was not according to the submission. So of "all actions," a cause of action is not. But all actions and quarrels include a cause of action.

Dyer 242.

§ 8. Submission by the husband of all disputes as to money laid out for his wife, at her request. Award that he pay \$340 for all sums laid out for her, (omitting at her request,) is not according to the submission,

Co. L. 285.—Cro. Jam. 639, Waters v. Bridge.

§ 9. A parson and his parishoners recited a dispute, if his tithes shall be paid in specie or not, and submit "all matters, as well spiritual as temporal, from the beginning of the world to the present day." The award is good that awarded him £7 for his tithes, due before the submission, and that they pay him £4 a year for the tithes growing due after, for the right to the tithes was in question and submitted.

1 Rol. Abr. 246.—Bac. Arb. 86.

§ 10. In most cases, things particularly mentioned in the submission must be particularly determined, and no award should be made of things not mentioned in the submission, yet however the award may be of things which depend on the principle, that is, of such things as relate to, or depend on, the things in the submission, though not expressed in it; as where the title and possession of land are submitted, the award may include the evidences concerning it. So as to debts and the evidences of them, as above.

8 H. C. 18.—Bac. Arb. 87.

§ 11. The submission was to four referees, "of all actions and demands," so as that the award be made by them, or any three of them. Plea, no award made; the plt. shewed that three of them awarded that all actions cease except a bond, which was to stand and be paid. This was held to be a good award, for

Cro. Jam. 399, 400, Berry v. Penning. Bac. Arb. 107.—Yelv. 203.

CH. 13. three had power, and an authority may be divided, though an
 Art. 14. interest cannot. And in respect to the bond there was an
 award made, viz. that it stand in force and be paid. Adjudged
 on error.

Bac. Arb.
 111.—Cro.
 Jam. 216.

§ 12. If all matters to January 29, be submitted, and the
 award be of all matters to January 28, the award is good ; for
 no matter shall be intended to have arisen after the 28th, un-
 less it be shewn.

Barnes 42,
 43.—Bac.
 Arb. 126.

§ 13. And an award is good, though it does not appear when
 it was executed.

§ 14. Parties are not bound by a submission, when they sub-
 mit, erroneously thinking they are bound to submit. 4 Cranch
 347.

Bac. Arb.
 223.

ART. 14. *Several rules.* § 1. The act of limitations does
 not apply to an award under seal. See Limitations.

Bac. Arb. 41.
 —6 Mod.
 232.—Co. L.
 90.—2 Cro.
 286, 664.—
 1 Com. D.
 531.—

§ 2. If an award be *de et super præmissis*, and the words used
 in it, be more comprehensive than the submission, it shall
 be intended that there was no more matter between the parties
 for the arbitrators to consider, than was submitted, if the con-
 trary be not shewn ; or if less comprehensive, no more was in
 controversy than the award naturally comprehends, if the con-
 trary be not shewn.

2 Saund. 190.
 —Wilkes 66,
 Storke v.
 Smith.
 Bac. Arb. 33.
 —Co. L. 286.
 —Bac. Arb.
 84, 85.

§ 3. A submission of all actions does not include causes
 of actions ; nor does one “ of all actions and quarrels,” include
 lands or tenements ; but one of all demands includes “ all mat-
 ters concerning the title of lands.” Nothing is intended to be
 referred but matters then in dispute.

Stra. 1144.—
 1 Com. D.
 524.—Bac.
 Arb. 161.—
 1 Com. D.
 523, 524.
 Salk. 71.—
 2 Wils. 10.

§ 4. All matters in difference between A and B include a
 demand A has, as executrix, against B. So a demand A's wife
 has as executrix ; for A has a demand, when he has one in
 his wife's right as executrix, and is liable for debts she so owes.

§ 5. Arbitrators may award any thing depending on the
 principle submitted. Hence in a submission of all debts, they
 may award a release of the bonds &c., for they are but a con-
 sequence of the debts.

1 Mod. 9.—
 Bac. Arb. 59,
 60, 94.

§ 6. If a father and minor son submit, on one part, and A
 on the other, the father is bound, and an award may be made
 between him and A, and is good and valid.

Kyd on
 Awards 248.
 —Bac. Arb.
 62, 63.

§ 7. If three men commit a trespass upon A, and A and
 one of them submit, and an award is made, the other two tres-
 passers may take advantage of it, though not parties, in extin-
 guishment of the trespass or wrong, as the satisfaction of one
 is of all.

Kyd 248.—
 Bac. Arb. 63.

§ 8. So if A keep my cattle, and they trespass on B, and
 A and B settle this matter by award, I may plead it, for the
 trespass is satisfied by A ; and then any one originally liable
 for it, may plead this.

§ 9. If the arbitrators reserve to themselves a power within their limit, and over a matter submitted, the award is not final, and so void ; for a part of their power is not executed. But if this power go to a matter not within the submission, the power reserved is void, and the award good ; for here all the power delegated is executed, and the power reserved, or to be executed, is *dehors* the submission, and so a nullity. But the arbitrator may reserve to himself the power to do a ministerial act, after the day allowed him to award, but not a judicial act. If arbitrators misconduct, how proved, Salk. 73.

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Art. 14.

Palm. 110,
146.—Bac.
Arb. 102, 103,
144, 145.

Morris' case.

§ 10. Some books state, that arbitrators cannot proceed after they have named an umpire, for then their authority ceases. But their authority may, or may not, cease by the appointment of an umpire. It may be so delegated to them as that this act shall put an end to it. On the other hand, "the appointment of an umpire, before their own time for making an award is expired, may be good," as in the case of *Doyley v. Pistoe*. This depends on a fair construction of the power given to the arbitrators, in which construction courts in modern times have not been very nice. As was stated in a former case, the arbitrators may elect the umpire even before they proceed to business, in which case the appointment is, in fact, conditional, that is, if they do not agree, then the umpire is to decide the case ; if they agree and award, he never is called upon to act.

Bac. Arb.

103.—

Doyley v.

Pistoe.—

2 T. R. 644,

Roe v. Doe.

§ 11. Arbitrators may award a *stranger* to do a *ministerial* act, as counsel to advise the form of a security, a surveyor to survey lands &c., but not a *judicial* act. So an award may be of such costs as a clerk of a court shall tax, for this is ministerial ; but it is a judicial act to appraise a horse, or to advise how all actions be released. Palm. 147 ; Cro. Jam. 315 ; 1 Ld. Raym. 123, *Bedam v. Clarkson*.

Bac. Arb. 71,

101.—Cro.

El. 726, Em-

ery v. Emery.

§ 12. The words, "if the arbitrators *cannot* agree," mean, if they *do not* agree.

1 Mod. 181.

—Bac. Arb.

75.

Bac. Arb. 77,

78.—Bac. Arb.

214.—Salk.

71, 72.—

5 Wheaton

394,—1 Com.

D. 524.

§ 13. The better opinion is, that if the umpire be named in the submission, he cannot make an award till the time allowed the arbitrators to make one, be expired. It may be otherwise if the arbitrators name him. An award is void, if it direct an administrator &c. to pay money as such, and in his own right, and do state how much in each.

§ 14. Though an award cannot pass land or discharge a speciality, yet if one submit these matters by bond, and do not convey the land or discharge the specialty, as awarded to do, he forfeits this bond. Ch. 141, award considered as involved in the action of debt.

§ 15. It is a general rule, that any party, or any one of a party, may revoke his submission before the award made, giving notice thereof to the arbitrators ; but then he forfeits his

1 Com. D.

525.—1 Rol

391.—Jon.

388.—8 Co

82.

CH. 13. obligation he has given to abide by their award. The marriage of a *feme sole* submitting to arbitration, is of itself a revocation and notice.

Art. 14.

Green v. Waring, 1 Bl. R. 476.— Watson on Partnership 283.

§ 16. If in a dispute between two parties, all matters in difference be referred, the referees may award the partnership between them to be dissolved. So if between a master and apprentice, the referees may award the indentures to be delivered up; and 8 East 445.

6 Mass. R. 43, Town v. Jaquith.

American cases. If A and B, by parol, refer a matter in dispute between them, to the award of three arbitrators, and they all hear the parties, and only two of them make the award, and the third dissent, the award is not good, there being no power given to a majority to decide.

9 Mass. R. 320.— Hodges in error v. Hodges ex'r.

§ 17. The plt. brought an action on a promissory note against the def't's testator for £270. They referred the action and all demands to three referees, or any two of them. The def't. filed his account. Referees reported the plt. had not supported his demands, and that the def't. recover costs of reference. Judgment was correctly entered on this report, and held the def't. had a right to his account filed, on which the arbitrators did not report.

9 Mass. R. 325.— May & al., plts. in error, v. Haven.

§ 18. In this case the court decided, that if a report of referees be recommitted to the same referees, they are not obliged to alter it, but may return the same report, without hearing the parties, if fully satisfied their report is correct. On the recommitment, one of the referees, though notified, declined attending; these facts the others reported, and further reported additional costs of the referees. Recommending a report does not make it void.

9 Mass. R. 510, Eaton v. Arnold.

§ 19. Pending the action, the parties agreed, out of court, to refer all demands to certain referees, who reported in favor of the plt. Held, this did not authorize a judgment in the action on the report, but that in the trial of the action the report may be used to ascertain the plt's. damages.

7 Mass. R. 359, Boyd v. Davis.

§ 26. This was *assumpsit* for money had and received. It had been referred by rule of court, and in the rule the plt. agreed he had no other demand against the def't.; the referees reported the def't. still held sundry notes, the proceeds of which would belong to the plt. when collected, and made a list of them. Held, this agreement was no bar to a future action, for these proceeds, when collected; for the referees expressly negatived the plt's. concession in the submission.

9 Mass. R. 199, Kingsley v. Bell & al. in error.

§ 21. This was a writ of error. And held, 1st. A declaring on an award, alleging no promise of the parties to perform it, was good after verdict. 2d. But a declaration not alleging the award was published or made known to the def't., but by bringing the action, is clearly bad. 3d. A justice of the

peace has no power to give judgment on an award. The action was *dismissed*. CH. 13.
Art. 13.

§ 22. An award set aside. The only competent evidence, that an award made pending the suit was afterwards set aside, is a transcript of the record, duly proved. 4 Manford 241.

Art. 15. § 1. Held, if arbitrators chosen by the parties make a mistake in the calculation of the sum awarded, no action at law lies to correct the mistake, nor can they be admitted to prove it. 2 Johns. R. 62, Newland v. Douglas.

§ 2. When an award is final on the face of it, nothing *dehors* the award can be pleaded, or given in evidence against it; nor can it be impeached "but for the misbehaviour or corrupt" conduct of the arbitrators. 3 Johns. R. 367, Barlow v. Todd.

§ 3. This submission was, so that the award &c. be ready to be delivered to the parties, on or before such a day. In an action on the bond, the deft. pleaded no award was ready to be delivered to the parties; the plt. replied, that though no award was ready to be delivered to the deft., yet one was made and ready to be delivered to the plt., and was delivered to him. On demurrer, the replication was adjudged bad. Also held, the authority given by the submission to arbitrators, must be strictly pursued. Cro. El. 797, 885; 1 Ld. Raym. 116, cited Cro. Car. 541. 1 Wils. 122.—
6 Johns. R. 14, Pratt v. Hackett.—
Kyd 115, 116.
—2 Caines 320, 325.—
3 H. 166.—
9 Johns. R. 212.—11 do. 96.

§ 4. The parties supposed themselves bound by law to refer, and under this mistake submitted their matters to arbitration. Held, the award made by the arbitrators in such case is not obligatory. See 2 Bos. & P. 131, Tattenall v. Groot; ; covenant to refer is no ground of action if not performed. 4 Cranch, 347.—8 D. & E. 139, Thompson v. Charnock.

§ 5. Held, if referees in a cause unreasonably refuse an adjournment, when requested, and urged by a party, in order that he may be enabled to produce his witnesses before the referees, their report will be set aside; but the court will not do this, where referees are chosen by consent of parties, and without a rule of court, 1 Johns. R. 315, Miller's case, not even on affidavit of merits, 1 Johns. R. 492, Stevenson v. Beecker. But if they order parties to withdraw, and in their absence examine witnesses, the court will set their report aside. 2 Johns. Cas. 214, Forbes v. Frary. 1 Dallas 83.

So the court set a report aside, because the referees declined to consider the most material ground of the controversy, on a mistaken principle, leading to real injustice to one of the parties. So the court rejected a report, because the action was founded on an *unlawful* contract: so for uncertainty, because it was that £75 was due the 3d of March last &c. 1 Dallas 119; but not for admitting an interested witness, 1 Dallas 161. But the court refused to set a report aside, because the referees sent for the plt. alone, and asked him whether he 1 Dallas 496.
4 Dallas 206.
1 Dallas 129.

- CH. 13. would agree a matter arising after the action brought, should
 Art. 15. be admitted; but set aside for allowing *ex parte* evidence to
 be given as to the price of certain work, when the suit was
 commenced, for the clerk's error in making out the rule, or
 agreement to refer; and, generally, what is cause of *new trial*
 is cause for setting aside a report of referees. Set aside, first,
 because the referees allowed interest on an unliquidated ac-
 count; and second, because they allowed a charge of premi-
 um and commission for making insurance, without requiring
 the policy to be produced, or any evidence of its being lost.
 But on motions to set aside the report of referees, the court
 has ever confined itself to two points; first, whether there is
 an evident mistake in *matter of fact*; second, whether the
 referees have clearly erred in *matter of law*. The effect of an
 award, 2 Gallison's R. 81, Klein v. Catara.
- 1 Dallas 187.
 1 Dallas 293.
 1 Dallas 314.
- Where not
 final.—
 2 Hen. &
 Mun. 408.—
 2 Bay 250.—
 1 Johns. R.
 315.
- 1 Dallas 355. § 6. Two actions between the same parties were referred,
 on different promissory notes; the referees reported one sum,
 and afterwards filed an additional report, distinguishing what
 was due on each action. Held, first report was bad, and
 second irregular.
- 1 Dallas 364. § 7. If referees award money to be paid on one side, and
 certain other things to be done on the other, and the court
 cannot enforce both, it will neither. But though the court
 cannot do this by *execution*, yet if it can by attachment, the
 remedies are deemed equal and mutual, though by different
 processes. Held also, an attachment lay for a contempt of court
 in not performing an award of referees, *at common law*; that
 in all cases, where matters are awarded to be done on both
 sides, the court will exercise its *equitable* powers in such a
 manner, as not to suffer either party to elude the performance
 of the award. And if any part of the award be impossible to
 be performed, the court will refuse an attachment, for that
 part. Bird v. Sand, 1 Johns. Cas. 393, reference postponed on
 account of an absent witness.
- 3 Johns. R.
 360, Thomp-
 son v. Parker.
- 1 Dallas 164. § 8. Where referees appointed by the court refuse to pro-
 ceed; the proper course against them is by attachment, after
 they have accepted.
- 1 Dallas 251.
 1 Dallas 347.
- 2 Dallas 157. An attorney's agreement to refer, binds his client; but
 referees ought never to be appointed, but in the presence of
 the parties. The court will not instruct referees on a point of
 law, though they apply for instruction.
- 6 East 309. § 9. The usage of referring ejectments, as well as accounts,
 is very ancient; and it has been the constant usage to confirm
 awards, though no damages or costs are found. Referees can-
 not alter their award and ready to be delivered.
- 4 Dallas 120. § 10. A report of referees cannot give a right or title to
 land, but it may settle a dispute about land, either in ejectment
 or trespass.

§ 11. An umpire chosen by referees must himself hear the parties and examine the witnesses; *ex parte* communications to referees ought to be condemned. 4 Dallas 232, 271, 300. CH. 13:
Art. 15.

§ 12. It is too late to annul a rule of reference, when the referees have investigated the whole transaction, and agreed upon their reports, and have conducted correctly. 4 Dallas 430.

§ 13. Notice of the time and place of the referees' meeting must be served on the party, not on his attorney, unless the rule provide for notice to the attorney. 1 Dallas.

§ 14. Where the exceptions to the report of referees arise from the face of it, and depend on construction of law, they need not be filed in writing. 1 Dallas 129.

§ 15. Case on agreement made January 29, 1810, between Brazer and other abutters on *Exchange Lane* in *Boston*, severally, on the one part, and the plts. on the other, reciting, the plts. agreed to widen this lane, and mutually promised each other to submit to the award of certain arbitrators, as to what each abutter should pay or receive as awarded &c. The arbitrators awarded the deft. pay \$5000, for the benefit he would receive by the widening, to other abutters. Judgment for the plts. 1. Though the abutters in fact agreed with a committee of the selectmen; for the plts. were held by law to pay the damages, and payment to the abutters was in fact payment to the plts. 2. No objection said widening had not been recorded: for the town had undertaken to widen the lane, and the deft might lawfully use it. 3. No objection, part of said \$5000 was to be paid to Henry Sargent, not a party to the submission or agreement; for deft. agreed to the award after made &c., and Sargent assented to it, though after made. 11 Mass. R.
447, Inhabitants of Boston v. Brazer,

Where a submission is to be to the award of two, and if they cannot award in such a time, then they may appoint an umpire; the two may appoint an umpire before they proceed to act on the matter submitted, and within their limited time. An award of payment of a specific sum by one party to the other, is final and sufficient, without a release. Again, held in the same case, if the umpire direct, that should any errors be found on the calculation of the sum awarded, on proof thereof the deft. should refund the amount, this does not open the merits of the dispute, but the award is final and valid. Held in this case, where the umpire was appointed *of, and concerning the premises*, and it was stated in the award, that he took upon himself the burden of the *umpirage*, it is to be intended, that he awarded concerning the subject matter submitted. Also held; 5, in an action of debt on an award, the plt. need not state more than what is in his favour, and sufficient to support his demand. The principles recognised in this action, however unauthorized by some of the old authori- 2 Johns. R.
57, 63,
M'Kinstry v.
Solomons.

CH. 14. ties, are very clearly supported by the best modern decisions,
 Art. 1. in which, and very reasonably, there have been constant endeavours to avoid ancient niceties and strictness in matters of award.

Lev. 174.

12 Mod. 612.

2 Ld. Raym. 671.

§ 16. The old authorities as to the election of an umpire were founded in ancient niceties, and are questionable; see on this point *Reynold v. Gray*, 1 Ld. Raym. 222, Ch. 70; *Mitchell v. Harris*, 1 Ld. Raym. 671; 1 Salk. 71. See Lofft 34, 137, 554.

2 Johns. Cas. 402.—

2 Johns. R. 374, *Adams v. Bailey*.

§ 17. It seems in New York the court will not refer causes, if questions of law are expected to arise in them; at least, the court will not order a cause referred in such a case, but reserve it for trial, and in a cause of great difficulty the court will set the report aside for a re-hearing. 1 Johns. Cas. 286.

2 Johns. R. 329, *Salisbury v. Scott*.

However, in a later case, when a motion to refer a cause was repelled by an affidavit, that questions of law would arise, held, such an affidavit must also state what the points of law are, to enable the court to judge of the reasonableness of allowing the reference or not.

1 Johns. Cas. 324, *Brower v. Kinsley*.

§ 18. If the rule of reference require the referees to report in a limited time, their power ends in that time, and any report made after is void.

4 Dallas 71.

§ 19. Referees cannot delegate their authority to others.

1 Vern. 396.

§ 20. If a husband submit a claim in his wife's right, and the arbitrator awards money to be paid to him, her claim is extinguished, and the new duty absolutely belongs to him; and if he die before it is paid, it goes to his executor. So, where he can get judgment in his own name alone for her debt.

§ 21. Awards not to be set aside but for partiality, corruption, or gross misconduct in the referees, or for some clear mistake of the law or the fact. 1 Johns. Ch. R. 101, *Herrick v. Blair & al.*; 2 Johns. Ch. R. 361, *Underhill v. Van Courtlandt*; 1551, *Todd v. Benlow*; ib. 276, *Shepherd v. Merrill*.

CHAPTER XIV.

ACTION OF ASSUMPSIT. ASSIGNMENTS.

See Ch. 24.
 2 Bl. Com. 326, 327.—
 1 Bac. Abr. 357.—1 Com.

ART. 1. *The principles and effects of assignments.* This action of *assumpsit* is often founded on *assignments* of property and of *chores in action*. "An assignment is properly a trans-

D. 553.—Co. Lit. 214.—Roll. Abr. 376.—1 Bla. 496.

der, or making over to another, the right one has in *any* *estate*." And in *assignments* he parts with his whole property, and the assignee stands to all intents and purposes in the place of the assignor. They are of estates, both real and personal. Assignments of *personal* estate only will be considered in this chapter; of real in another: nor will the assignments of *bills of exchange* or *promissory notes* be considered in this chapter, but under their proper head: so bail bonds, mortgages, &c.

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§ 2. It is a general principle, that a *possibility*, or a thing *in action*, or cause of suit, or a title for a condition broken, cannot be assigned over by law; and this to prevent maintenance and oppression. Many cases of assignments, see *Insolvency* &c.

1 Bac. Abr. 157.—Co. L. 314.—1 Dal- las 268.— 1 Johns. Ca. 57.—7 East 153.

§ 3. A personal trust, one man reposes in another, cannot be assigned over, however able the assignee may be to execute the trust; it is a confidence in the trustee *personally*.

1 Bac. Abr. 158.—3 D. & E. 696.— 2 W. Bl. 820.

§ 4. Though a bond, or note not negotiable, being a *chose in action*, cannot regularly be assigned over, so as to enable the assignee to sue it in his own name, yet in equity and justice he has the property, and in this the law will protect him. So much so, that if the contractor, *after notice of the assignment*, pays the contents to the contractee, he will be compelled to pay it over again to the assignee; but otherwise, if he pay to the contractee *without notice*. Nor can the assignor revoke the assignment, nor will the court allow him to revoke his power to recover the contents in his name, he has given to the *assignee* for a valuable consideration. But the *assignee* must take this contract or property, subject to the same equity it was subject to in the assignor's hands, he can take it in no better condition than he held it, from whom the *assignee* receives it. *Assign* includes all under another's title by act of law, or in fact.

1 Bac. Abr. 157.—Co. L. 232.—1 Bos. & P. 447.— 2 Vern. 595.—3 Chan. R. 90.—Ld. Raym. 693.— 2 Vern. 428, 540, 692, 764. 563.—3 Lev. 312.—2 Salk. 563.—10 Co. 47.—4 Mod. 48.—Lofft 314, Holley v. Scott.

§ 5. Nor is a bond, or debt assigned over by a creditor, assets in the hands of his executor or administrator; for by the assignment he passes the property substantially to the assignee, and gives him a right, the law as well as equity will protect, to receive the debt to his own use. Assignment of a *chose in action* need not be by deed.

Salk. 79, Deering v. Torrington.— 4 D. & E. 690.

§ 6. If A owe B \$1000 on contracts not negotiable, and B assign this debt to me among others, and makes me his attorney to settle and recover it, I may refer them; and the referees may award the debtors to pay me the sum due to B, as his *assignee* and attorney; and *in my own name* I can recover this sum.

4 Cruise 160. 162.

ART. 2. *English cases*. If an obligee in a bond become a bankrupt after he has assigned it, he must sue it, or the assignee in his name.

1 D. & E. 619. Winch v. Keeley.

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8 T. R. 571,
Banfill v.
Leigh & al.—
See many
useful forms
of assign-
ments, Oli-
ver's Con-
veyancer 58
to 110, and
Wood's Con-
veyancer,
2 vol. 164 to
632.

§ 1. In 1797, the plt's. father and Geaves & Co. *assigned* to the plt. all debts due to them, and gave him a power of attorney to receive them to his use, and to compound for them. Certain debts subsisted between them, the assignors, and the defts. In 1799, the plt. and defts. referred them, and the plt. and defts. promised to each other to abide by, and perform the award of the referees. They awarded, that there was due from the defts. to the plt, "as the attorney and assignee of E. J. Banfill, senior (the father,) and Geaves as aforesaid £831 19s. 6d.," and that the defts. should pay this sum to the plt. "in full discharge of debts and sums of money due from the defts. to" the assignors, and pointed out the manner of payment by bill of exchange. The plt., the assignee, brought *assumpsit* in *his own* name, and, on argument, recovered this sum; but had he been only the *attorney* of Banfill senior and Geaves, then he must have referred and sued in their names.

1 Wils. 211,
Morrrough v.
Comyns.

§ 2. In this case, one of the captors of a prize *assigned* his share to the plt., *after the capture was made, but before condemnation*, and the plt. brought *assumpsit* for money had and received against the deft., the ship's agent, who had sold the prize, and recovered. And the court held, when the prize is condemned, "the property must be considered as immediately vested, at the instant the ship was taken." Wright J. said, "at common law, the subject, in time of war, was entitled to the property of whatever kind he could take from the king's enemies," "and we are to be governed by that, and not by the law of nations." This was, in fact, a *sale and transfer* of the share, the seller's property in which, *vested by relation*, before he sold or assigned; but if the plt. had taken the *assignment* of this share *before the capture*, could he have recovered? had the seamen any *assignable interest before the capture*? At any rate, this was an assignment of a chose in action. Cited 1 Cranch 424.

Assignments
must be by
deed, 4 Cruise
161.—
No need of
technical
words, ib.

4 T. R. 248,
Ledderdale
v. Montrose.
2 Stra. 1215.
—1 H. Bl.
627.—3 D. &
E. 681.

§ 3. *The future half-pay of an officer is not assignable*, nor the full pay of a military officer. No *chose in action* can be assigned, so as to give the assignee *assumpsit* or other action in *his own* name, unless it be negotiable, or except some stock contracts. 3 Dall. 505; 1 Cranch 438.

1 T. R. 26.—
1 Com. D.
563, Delany
v. Stoddart.
—4 Cruise
170.

§ 4. Though a *chose in action* cannot strictly be assigned in law, yet in equity it may be, and in case of a policy of insurance, the court will so far take notice of an *assignment*, as to permit an action to be brought in the name of the assignor. 4 Cruise 162, 172; 2 Cruise 6.

Skinn. 143.—
1 Com. D.
330.—Salk.
79.—2 Cruise
122, 452.—
6 Cruise 522.

§ 5. If B owe a debt to the testator, and his executor assigns it to A in satisfaction of a just demand, the administrator *de bonis non* of the testator shall not sue B; for by the as-

signment it is become A's property. An executory interest is assignable in equity.

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§ 6. Bills of lading of goods *in transitu* are sent to a consignee, and he assigns them to a third person for a valuable consideration, as against such assignee the right of the consignor is divested. The consignee is entrusted with these bills, and the assignee of them is an innocent purchaser for a valuable consideration.

5 T. R. 683.

—1 H. Bl.

357, 504.

§ 7. A *chose in action* has ever been assignable in equity; and the equitable interest of an assignee has long been recognised in courts of law, and has been deemed a good consideration of a promise. The right to the thing passes, but the remedy, or form of it does not, but must be pursued to recover the transferred right. How freight, before due, may be assigned, see Ch. 33, a. 2, s. 21, Freight.

Chitty 7, 8.

ART. 3. *American cases.* § 1. In this case the Supreme Judicial Court of Massachusetts decided, that the assignee of a *chose in action* has such an interest in it by the assignment, as the law will protect, if made for an adequate consideration.

1 Mass. R.

117, Perkins

v. Parker.—

1 Dallas 23.

§ 2. And the Supreme Court of Pennsylvania decided that the assignee, *bona fide*, has such an interest in the debt assigned; that the nominal plt., the assignor, in whose name the action is brought *pro forma*, cannot discontinue it but by the consent of the assignee. See also Ch. 192, a. 5, s. 7; Ch. 112, a. 5, s. 18.

1 Dallas 139,

M'Callum v.

Coxe.—

1 Bin. 428.

§ 3. There are two cases, in which the consignor of goods may stop them *in transitu* as to the consignee; 1st, when he is insolvent; 2, has paid no consideration for them; but neither of these circumstances can affect the innocent assignee of the goods, with the bills of lading, for a valuable consideration, when the consignee and assignor is entrusted with the said bills of lading, and delivers them over to the assignee.

2 Dallas 183.

—Cain. exr.

84.—3 Dallas

505.—4 Dal-

las 169.—

1 Cranch 438.

—11 Mass. R.

157.—9 Mass.

R. 183.

§ 4. W. C. Martin was indebted to James Scott about \$5000, and shipped goods in the ship A, and got them insured, and to secure Scott, assigned to him the bills of lading and policy of insurance by a blank endorsement. A total loss happened. Wells, one of the underwriters, was attached as trustee of Martin, by the plt.; and Wells, at the time of the attachment, had no knowledge of the assignment to Scott. The court discharged the trustees, and held, that the assignment, though without the knowledge or assent of the underwriters, vested an equitable right in the assignee, and had Wells paid the loss to Martin after the assignment, no doubt it would have been money had and received to Scott's use, which he could have recovered in this action of *assumpsit*.

Mass. S. J.

Court, Feb.

1801, Boston;

Wakefield v.

Martin & trust-

tees.

§ 5. In this case it was decided, that the assignment of a *chose in action* is not defeated by the assignor's death, but the

9 Mass. R.

337, Dawes,

judge, & al.

v. Boylston.

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assignee may sue and recover in the name of the executor or administrator of the assignor; and if the assignee afterwards become the assignor's executor or administrator, he may recover the same as such executor or administrator to his own use, and need not account for it. But if the assignees of a bankrupt, deceased, assign property of his to his administrator *cum testamento annexo*, for his own use and benefit, the administrator must account for it to the creditors of the deceased; or to those entitled under his will. In this case, Thomas Boylston, of London, in 1793 &c., became a bankrupt, and assigned all his estate, effects, and credits to Lee, Erving, and Latham, assignees; Moses Gill owed Boylston about £100,000, and he died December 30, 1798; deft. took administration on his estate in Massachusetts to recover this debt, and August 24, 1799, said assignees assigned it to him *to his own use*, for \$3,333 consideration, and he sued and recovered it accordingly, of Gill's executor, and claimed this debt as his own. The judge of probate sued the probate bond for the benefit of the inhabitants of Boston, residuary legatees in Thomas Boylston's will. The testator's creditors were paid as far as concerned the assignees, or effects in their hands. Subsequently, but August 24, 1799, it was not known there would be a large surplus of his estate, since found to exist. Judgment, as above, for the plt., holding the deft. Ward N. Boylston, accountable for said debt, on the ground, that an executor or administrator *being such*, cannot by law be a purchaser or assignee, to his own use, of a *chose in action*, or estate of the deceased; and to allow such purchase to be valid, would be a *devastavit*. Further, though the deft., as such administrator, might collect and pay debts here, yet all the personal estate of the testator must be collected and *distributed in one place*, in this case, in England, where he had his *domicil* at his death. The place of one's *domicil* is, *prima facie*, where he resides, but that may be rebutted or supported by circumstances; his *domicil* must be *stationary*, not an occasional residence, in order that the municipal institutions may attach on his *property*. 1 Wooddes. 385. If an alien, resident abroad, die intestate, all his property is distributed by the law of the country where he resides. Toller's L. of Ex. 387; Amb. 27. And the administrator here was only *ancillary* to that in England.

2 Bos. & P.
296.—Many
cases,
Toller 387.

5 Johns. R.
335, 346,
Wilkes & al.
v. Ferris —
3 Day's Ca.
340, 361.—4
Day's Ca. 146.

§ 6. The debtor assigned, in trust for several creditors, all his property, goods, chattels, debts, &c., particularly specified in a schedule annexed to the deed of assignment. Held, this was not a general assignment of all his estate, but only of the articles specified in the schedule; held, 2. the residuary interest resulting and remaining to the debtor, after the purposes of his assignment were answered, was not an interest that

could be attached or taken in execution; and if the assignment be fair, it is not void on account of such residuary interest; 3. and a delivery of the key of the warehouse &c. is a delivery of the goods.

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§ 7. The court will take notice of the assignment of a *chose in action*, and protect the rights of the assignee. 12 Johns. cases 121. And notice from the assignee of the debt to the obligor of the breach of the condition, is sufficient. *Van Vechten v. Graves*, 4 Johns. R. 403, 407. And where the plt. recovered judgment, and then assigned it to A, and afterwards entered satisfaction on the record, the court, on motion, vacated this record.

3 Johns. R. 425, Littlefield v. Story.—2 Johns. Cases 121, Wardel v. Eden, & 629

§ 8. Two partners being embarrassed, drew an order on their agent, and ordered him to pay to the plt. the monies the agent should receive from certain persons in Europe, as soon as he should receive them, and from whom he had power to receive them, being certain sums due on policies of insurance. This order the agent accepted, the day it was drawn, "to pay the monies as soon as they came into his hands." The assignees of the partners sued, and held, that the order and acceptance amounted to an *assignment*, and fixed the fund in the debt, or for his benefit, so that it could not be recalled.

3 Johns. R. 71, 86, M' Mennomy v. Ferrers.—1 Caines 363.—Assignee of a covenant cannot sue in his own name.—1 Penning 143.

§ 9. Two partners in trade dissolved their partnership, one took the property and engaged to pay the debts, among which was a judgment against them at the suit of C. The partner that took the property &c. became insolvent. C threatened to sue out execution against the other partner, and hence he paid the judgment, and C agreed he should have the benefit of it to recover the amount out of the property of his said insolvent partner, in C's name; sued accordingly, and execution against his lands, bound by the judgment. The insolvent assigned all his property to D and others, for the benefit of his creditors. Held, the solvent partner was merely as a surety to the insolvent one, and entitled to an equitable *lien* on his property; and that D &c. took it subject to this *lien*, and so not entitled to any relief by *audita querela*. If a bill be endorsed to A B, *treasurer of the United States*, and delivered to him as *such treasurer*, and bought with their money, they may sue on this assignment.

2 Johns. Ca. 237, Waddington & al. v. Verdenburg.—Payee assigns a note, and the maker does not pay it, payee may sue him on redelivery only, 1 Penning 35, Boylan v. Vighie. 3 Wheat. R. 172, Dugan & al. v. U. States.

§ 10. The obligee assigned his bond to A, who sued it in the obligee's name. The debt., the obligor, pleaded a release from the obligee, A replied the *prior assignment*, and held the release was a nullity. A prize ordered to be sold, a share in it is not assignable.

1 Johns. Ca. 441, Andrews v. Beecker.—

§ 11. All these cases in Massachusetts and New York have been decided on English authorities, and the Federal courts decide on the same principles; but in Pennsylvania there has

13 Mass. R. 290.

CH. 14. many years been a statute for the assignment of a bond, and
 Art. 3. to enable the assignee to sue in his own name; but he takes
 it at his peril, and stands merely in the place of the obligee.
 1 Dallas 23, 139.

1 Dallas 144.

§ 12. A bond payable to A, with a memorandum subjoined, it was for B's use, was by him assigned to C. Held, this was no legal assignment, within the statute. Hence, C could not sue in his own name, and if C subsequently assign the same bond, it is only an assignment of his *equitable* interest on the principles of the common law.

1 Mass. R.
 25, 26, Orr &
 al. v. Amory.
 —10 Mass. R.
 482.—2 Mass.
 R. 281.

§ 13. The plts., citizens of *Philadelphia*, brought *assumpsit* as assignees of *Bernu & al.*, also of that city, against the def., surviving partner &c. Bernu & al. January 14. 1811, by deed assigned all their lands, goods, &c. to the plts. in trust, &c. and so this debt, &c. Held, the plts. could not maintain the action on this *voluntary* assignment of the contract; for a *chose in action* is not assignable, at common law, nor by any statute in Massachusetts.

11 Mass. R.
 488, Wood v.
 Partridge.—
 15 Mass. R.
 481.

§ 14. An assignee of a *chose in action* to avail himself of the assignment, if the debtor be trustee, must notify him of the assignment, and shew him of the evidence of it, to enable him to disclose all the facts to the court. 2. A lessee, who has covenanted to pay rent quarterly, can be held as trustee of the lessor for so many quarters' rent only, as are due by the covenant at the time he was summoned.

11 Mass. R.
 153, Browne
 v. Maine
 Bank.

§ 15. *Entry sur disseisin*. A attached lands, and got judgment, and assigned to the plt., and execution extended, and A released to the plt. Held, this conveyed a title in the land to the plt. against a creditor of A, who attached it *after* the extent, and *before* the release, for the last attachment was *after* the judgment and execution were assigned, and notice thereof given to debts.; plt's. title is from the original attachment.

4 Johns. R.
 403.—C. 14.
 6 Cranch 332,
 Serre v.
 Pitot.

§ 16. *Where the assignee of a bond may give notice, &c.*

§ 17. The general assignee of an insolvent's effects cannot sue in the Federal courts, if his assignor could not; nor assignee of a part of a patent, for a violation of it. 6 Cranch 324; 4 Cranch 73.

7 Cranch 308.

§ 18. Where an assignee of a share of property, as security for a debt, is bound beyond the value of such share.

13 Mass. R.
 304, Jones v.
 Walter.

§ 19. *Assignment of a note by delivery only, is valid*. As where *assumpsit* was brought on a promissory note, which the promisee assigned, for a valuable consideration to A, by delivery, and not by any endorsement or writing; of this the promisor was notified. Held, A could recover the note against him in an action in the name of the promisee, notwithstanding the maker, after so notified, made payment to the promisee. This note being *to order*, and so negotiable, made no differ-

ence, as it was not negotiated. The deft. urged, that this naked delivery was a mere bailment that conveyed no property ; but the court held, here was such an assignment in equity, as a court of law would support, in all respects, except allowing an action in the name of the assignee ; and the assignment may be proved by witnesses. This, it seems, was the first decision direct to the point of this assignment.

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§ 20. The assignee of a bond cannot sue it in his own name against the obligor, though it be to the obligee and his assigns. Decided on demurrer to the declaration. See Ch. 168, a. 5, s. 29 ; Ch. 20, a. 20, s. 46 ; Ch. 9, a. 1, s. 8 ; Court observed, this was the first attempt of the kind.

14 Mass. R.
107, Skinner
v. Somes, jr.

§ 21. *Rights of assignees of choses in action.* Assumpsit on a written memorandum, signed by the deft. June 21, 1814, made between the plt. and B, son of the deft., as to building &c. a dye house on B's land ; plt. to use it two years &c. rent free, and at the end of two years B to pay the plt. the costs. He built &c. and January 30, 1816, deft. became the owner of it, and then adjusted the amount due to the plt. \$842 88, on said agreement, and then, by writing signed, promised to pay it to the plt. June 21, 1816. Ph. sued for said \$842 88. February 2, 1816, he assigned deft's. memorandum, by deed, to two of his creditors to secure their debts ; of this, deft. had notice February 3, 1816, and then said, nothing would be due to the plt. on a final settlement. Assignees, in fact, sued the action, and plt. had judgment for \$480 11, the sum he owed them. Held, the deft. could not off-set any matter arising after the said assignment and notice thereof ; as after that, he could not, by any act of his, deprive the assignees of their rights under the assignment. A assigns a bond to B, and he gets judgment in A's name, and B gives the execution to an officer, and informs him of his equitable interest, and the officer suffers an escape ; for it, B may recover against him in A's name, and his release will not protect the officer. 15 Johns. R. 405.

14 Mass R.
291, Jenkins
v. Brewster.

§ 22. A covenants to assign a patent right in as full a manner as B had assigned it to A ; a covenant of warranty in such assignment is not necessarily implied. The assignee of such right must get the deed of transfer recorded in the proper office.

14 Mass. R.
389, Morril v.
Worthington.

§ 23. Both avowant and person making conveyance, may take an assignment of a replevin bond and sue jointly on it.

8 Maule & S.
183.

§ 24. 2d, Assignees of a bond, how entitled to interest, &c. Tazewell's exr. v. Barrett & Co. 4 Hen. & M. 259, 266. This was an action of debt brought by Barrett & Co., assignees of Walker & Co., assignees of Theo. Bland, obligee, against Tazewell's exr. on his bond ; penalty \$1800, dated

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March 13, 1785; conditioned to pay £900 on or before December 25, 1786; assigned to Walker & Co. May 10, 1786; and by them to Barrett & Co. March 10, 1787. May, 1786, chancery process issued and was served on the obligor and obligee at the suit of his creditor. September, 1787, the obligor had notice the bond was assigned to Walker & Co. March, 1788, an attachment issued, to compel him, Tazewell, to answer; the same month Walker & Co. assigned to Barrett & Co. May 21, 1788, the court made an order to restrain Tazewell from disposing of any debts or effects of Theod. Bland, and Barrett & Co. made debts. to the suit, who filed their answer, and August, 1788, withdrew it, and the bill dismissed as to them. In September, 1792, Tazewell filed his answer, *five years and a half after* the chancery process issued &c., during which time he withheld the debt from Barrett & Co., and refused to pay interest during this time, under a pretence the said process confined the debt in his hands. On these facts held, 1. after a *bona fide* assignment of a bond, and notice thereof to the obligor, he cannot be restrained by a chancery attachment, at the suit of the obligee's creditor, from paying the debt to the assignee, though the *subpoena* with the clerk's usual endorsement, was served on him before he received such notice; and *afterwards* (but before he answered the bill) the court made an order as above, restraining him from paying the debt. 2. That the obligor was not entitled, in a suit against him *by said assignees*, to any deduction of interest, between the day when the bond became payable, and the time when the restraining order was set aside. Judge Fleming added, it was by the obligor's fault, the process was so long pending.

CHAPTER XV.

ATTORNIES.

1 Esp. 8.—
Am. Prec.
MS.—1 Com.
D. 618.—
1 Solw. 146.
Lutw. 31.—
Hob. 67.—
Cro. El. 760.

ART. 1. *Assumpsit for their fees.* § 1. Whenever attorneys are employed by any one, in court, or out of court, they may have an action of *assumpsit* for a compensation for their services, or for their services and disbursements, done and made by request, for the price, where that is agreed, and where not, for a *quantum meruit*; or he may have debt in many cases.

§ 2. *Assumpsit by an executrix.* The plt. declared, that her testator being an attorney of the C. B., the deft. was indebted to

him in divers sums, for costs and expenses, by the testator laid out and expended at the deft's. request, for prosecuting and defending divers suits for the deft., and for his fees in divers terms, and the testator's expenses and sums of money laid out as servant and solicitor of the deft. in divers other courts in Westminster, at the deft's. request, in prosecuting and defending his suits therein, the deft. promised to pay the testator &c.

§ 3. Judgment for the plt., and error was brought because he demanded fees in other courts, where he was not attorney, which is maintenance and unlawful, but the judgment was affirmed by all the court. And it was held, that an attorney may well be a solicitor for his client in other courts, as well as in the court where he is attorney, and a promise to pay him for his services is lawful and good.

§ 4. Trevilian, an attorney, sued Sands for £10, for that Sands retained him to prosecute a suit, as an attorney to one Worlich, and promised to pay the plt. his fees; and the court held that *debt* did not lie against Sands, but *assumpsit* only, but debt might have lain against Worlich, who assented to the service. The same if an agent or solicitor employ him. Warrant of attorney need not be sealed, 5 Taun. 264, nor witnessed.

§ 5. A and B, attorneys to C, by deed covenanted under their hands and seals, to convey lands to D, on his paying a certain sum of money. A and B brought covenant in their own names against D, and judgment for the deft., for if the covenant is to be viewed as made with C, the action must be in his name. But if to be viewed as made by, and with the attorneys, in their own names as attorneys, then the contract is void. See *Frontin v. Small*; 2 Ld. Raym. 1418; Com. D. tit. Attorney, c. 14.

§ 6. Attorneys and solicitors may have debt or *indebitatus assumpsit* for their fees; *assumpsit* is most usual; and one may have this action for soliciting a cause in a court in which he is not attorney. Cro. Car. 159.

§ 7. And to an attorney's action of *assumpsit* the deft. may plead the statute of limitations, to wit: that he did not promise within six years before the action brought.

§ 8. Attorneys liable &c. If A allow his name to be used by B in an action, as lessor, but on condition A be subjected to no costs, and B, his attorney, so use A's name as to subject him to costs, A has an action against the attorney to recover all he is obliged to pay.

§ 9. *Assumpsit* for his fees, and held though it may not be necessary to prove the attorney originally employed by the party, yet his recognition of him, in some stage of the cause,

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Cro. Car. 159, *Thurby v. Warren*.—1 Selw. N. R. 146, same case,—

In N. York if he unjustly withhold his client's money, the court affords relief in a summary way, 3 *Caines' R.* 221.

If he cease to practise one year, he loses his privilege as to being sued, *Coleman* 133, *Brooks v. Patterson*. Cro. Car. 193, 194.

Sands v. Trevilian, in error.—1 Com. D. 518.—*Skin.* 217, 218.—1 Selw. 146. 6 *Johns. R.* 94, 96, *Bogart v. De Bussey*.

1 Selw. 146.—Cro. J. 520, *Bradford v. Woodhouse*.

Ld. Raym. 2.—1 Selw. 146, *Oliver v. Thomas*.

8 *Johns. R.* 218, 313, *Bradt v. Walton & al.*

9 *Johns. R.* 142, *Hotchkiss v. Le Roy & al.*

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9 Johns. R. 266, Webb v. Cleveland, attorney.
2 Phil. Ev. 78.—
11 Johns. R. 547.
6 T. R. 361, Read v. Duper.—1 Com. D. 616.—
3 T. R. 666, Vaughan v. Davies.—
1 Maule & Sel. R. 240; also 1 East 464, Ormerod v. Tate.

is necessary to be shown, to make the party liable for costs. The attorney's acting as such in the cause is not sufficient.

§ 10. If an attorney be sued in an inferior court, in which he is privileged from arrest, the cause cannot be removed into the Supreme Court by a *habeas corpus cum causa*.

§ 11. It is not a good defence to an attorney's action, to shew negligence in his conducting the business for which he charges, and if a defence it is not in evidence on the general issue. *Runian v. Nichols*.

ART. 2. *Where he has a lien for costs, and an assumpsit lies thereon.* § 1. The plt's. debt and costs are often recovered by the industry, and often at the expense of his attorney, therefore he has a *lien* on the debt and costs in the hands of the deft. or his attorney, after notice given to the holder of them, by the plt's. attorney, his bill not being paid; therefore if after such notice, the deft's. attorney pay the plt. his debt and costs, though to prevent the deft's. being arrested, yet the deft's. attorney must pay the plt's. attorney his said bill whereof notice was given. It will be observed in that case, that the plt's. attorney had his *lien* on what never was in his hands or possession.

5 Mass. R. 309, Gatchell v. Clark.

§ 2. But in this case referees reported in the plt's. favor, and before judgment the parties themselves settled the matter, (or if done after,) the court held that the plt's. attorney had no *lien* on the cause for his fees, but his only remedy is by action against his client. For before judgment, the plt. might settle the action "against the consent of his attorney," and that "after judgment, if the plt. released the judgment to the deft., the law had provided no remedy for him," but such action. So he has for a general balance a *lien* on his client's papers in his hands. *Maule & Sel. 535*.

Dougl. 104, 238, Mitchell v. Oldfield.

§ 3. The attorney has a *lien* on his client's deeds, papers, and money, for his bill, and will not be ordered to deliver them without being paid his fees. But not on a deed he has drawn, after it is executed. 1 L. Ray. 738.

4 T. R. 123.—12 Mod. 554 & 409.—
He is not held to produce in evidence a paper, left with him in another cause,
3 Day's Ca. 499; he can waive his privilege but by leave of court, 9 Johns. R. 216.

§ 4. The deft. had recovered judgment in the first action against the plt. and B; and in this action the plt. recovered judgment against the deft.; and the court allowed the attorney of the plt., Mitchell, to be satisfied his costs, before the deft. was allowed to make an off-set of the judgment he had recovered against the plt. and B, against this judgment. Mitchell had absconded; and Lord Kenyon said this off-set was not by the statute of off-sets, but by an equitable jurisdiction the court had often exercised. Mitchell's attorney was concerned only in this his action against the deft., not in the

deft's. action against Mitchell and B. See more cases *set-off*, CH. 15. Ch. 168, a. 1, a. 6, &c. Art. 3.

§ 5. If an attorney have papers of his client in his hands, the court will order the attorney, on his fees being secured, to deliver them to his client; but if a third person have an interest in them, the court will direct security that they be produced for his inspection on his demand of them. Practice the K. B., and C. B., are different. 2 H. Bl. 587, and cases cited.

§ 6. In this case it was decided, that if the plt. settle the debt and costs with the deft. before the plt's. attorney has been paid his fees, the court will not compel the deft. to pay him, unless he gave notice to the deft. not to settle with the plt. till his bill should be paid; this strongly implies that if he had given such notice, the action could not have been settled without paying his fees:—Is it difficult to reconcile the English cases, with that of *Gatchell v. Clark*? See *Howell v. Harding*.

§ 7. In this case the court held, that an attorney had a *lien* for his bill on monies levied by the sheriff, under an execution on a judgment recovered by his client, though the defendant had notified the sheriff to retain the money, stating he should move to have the judgment set aside for irregularity.

§ 8. The plt. recovered judgment against the deft. for £400 on a bond, charged him in execution in 1783, and died in 1797. In this term (1799) the deft. moved to be discharged out of custody, his wife having taken administration on the plt's. estate. The court held the plt's. attorney had no *lien* on the judgment, so as to prevent the deft. being discharged; that the action was destroyed by the deft's. wife taking administration to the creditor.

§ 9. But it is to be observed, that these rights can only extend to persons who can legally be attorneys, and in the case in which the service is done. Who is, or is not, such a one, is properly to be considered under the head of attorneys generally. Every attorney is under the power of the court and amenable to it, and may be attached for any contempt of it. Mass. Act, Feb. 26, 1811; this act provides that in case of cross executions the attorney's *lien* shall not be affected; 11 Mass. R. 236, *Baker v. Cook*; this act gives him a *lien*.

ART. 3. *Submission by an attorney.* § 1. If B submit to reference as the attorney of C, B shall be bound. See the case of *Bacon v. Duberry*, ante. It must be understood, the attorney is bound only when he does not bind his principal, either because he has no power to bind him, or because he does not proceed in a manner to bind him; for if the attorney has power to bind his principal, and does in fact so submit to reference as to bind him, then the submission is the principal's

CH. 15. act, he is bound, and the attorney is not personally bound.
 Art. 4. See *Banfill v. Leigh & al.*, where a practising attorney may legally relinquish his business to others on terms.

8 T. R. 571.
 4 East 190,
Barn v. Grey.
 1 Bac. Abr.
 123, 198.
 Co. L. 48—
 1 Com. D.
 606, 607, 625.
 —1 T. R. 62.
 2 Salk. 89,
 96.—Chitty
 27.
 Chitty 27.—
 7 T. R. 209.
 F. N. B. 59.—
 3 Salk. 49,
 50.

2d Part of the
 Colony Laws
 11.—Mass.
 Act Nov. 4,
 1785.—3 Bl.
 Com. 26, 26.
 2 Hawk. P. C.
 273.—1 Bac.
 Abr. 185.

Chitty 27.—
 7 T. R. 209.

Statute of the
 U. S. Sept. 4,
 1789.

Art. 12, Decla-
 ration of
 Rights.

The court on
 general prin-
 ciples of
 equity and
 policy will
 examine the
 dealings be-
 tween them
 and their cli-
 ents, and
 guard the lat-
 ter &c.
 9 Johns. R.
 253.

ART. 4. *Who is an attorney &c.* An attorney is one put in the place of another, and is public, as an attorney at law, or private, "who has authority given him to act in the place and stead of him by whom he is delegated, in private contracts and agreements," which authority must be by deed, "that it may appear that the attorney has pursued his commission." And *feme coverts, minors, aliens, &c.*, may be attorneys. He must have a lawful warrant.

§ 2. According to the case of *Needham v. Gorham*, and other cases, a deed or written power is not always necessary to constitute an agent or an attorney, but that by *parol* appointment one may refer to arbitration, or transact business for another. The English anciently required every one to appear in court in person as the writ commanded.

§ 3. By Massachusetts Colony Laws, revised A. D. 1673, all plts. were allowed to sue for any estate, or to sue for any right, by attorney authorized under hand and seal: and now every deft. in a *criminal* cause must appear in person, except in a few cases in which the court may allow his appearance by attorney. In every *capital* case he must appear in person; to this rule there can be no exception; but for every crime under the degree of capital, the deft., by the favour of the court, may appear by attorney, and this till conviction.

The many cases in the old laws of England, in which the party could appear by attorney, *only* by particular *statutes*, or the king's license, may now be put out of the question. One may be attorney by *parol*, to sign and endorse bills and notes &c.

§ 4. By this act of the United States, in all their courts, "the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law," as by their rules may be permitted. Laws of Maine, Ch. 89.

§ 5. And by the Constitution of Massachusetts, every man may be heard in his defence by himself or counsel.

By many statutes passed, and by the rules of all our courts, no man can be admitted to practise as an attorney or counselor in them, unless he be of a good moral character, and is properly qualified, and has taken and subscribed the necessary oaths. The statutes and rules in regard to this subject in the United States are numerous, and to be found at large in the statute books, rules of courts, and bar rules, which are, very generally, calculated to form and preserve in the United States a respectable order of lawyers.

§ 6. It is a general rule, that no one can make an attorney, who has not a capacity to act and bind him or herself. Hence, minors and married women cannot make attorneys; and where the husband and wife are sued, he makes an attorney for her; but all persons of discretion may be attorneys, as infants having discretion and understanding &c.

CH. 15.
Art. 4.

F. N. B. 61,
note.—

1 Mod. 47, 72,
296, 297.—

1 Bac. Abr.
183.

W. II, C. 10.

1 Co. 116 to

125, Belcher's case.—

Salk. 69.

§ 7. An English statute empowered all persons to appear by attorney, who had ability to make him.

§ 8. It is error to appear by attorney, where, by law, it cannot be done; and it is error, if an *infant* appear by attorney, nor can a *retraxit* be by attorney; but an attorney may remit damages.

The attorney's consent in court binds his client; if he takes upon himself to appear, the court looks no further; but proceeds as if he had sufficient power, and leaves the party to his action against his attorney. He is not compellable to appear, unless he takes his fees or backs the warrant, or takes a power. And if he appears without warrant, our courts receive him as an attorney of the party, if he, the attorney, declares he has been spoken to by his client, or by one for him. The attorney who undertakes to appear must do it in a proper manner, and his entry as an *attorney* may be so amended as to stand as the entry of a *guardian*.

Salk. 66, 87,
88.

Must be some
evidence of
being employed in a
suit.

9 Johns. R.
142.

Stra. 144.

§ 9. An attorney must appear if he undertakes to do it, though at the request of a third person only, and without the knowledge of the party interested, where his appearance is necessary to support the proceedings.

Stra. 603,
Lorimer v.
Hollester.

§ 10. If an executor give me a power of attorney to act for him *as executor*, this does not authorize me to accept a bill of exchange to charge him in *his own right*, though for debts due from his testator. The power of attorney was, in this case, cautiously drawn, to enable the attorney to charge the *executrix as such only*, whereas he accepted the bill to charge *her in her own right*. An attorney can never substitute but by express power.

6 T. R. 500,
Gardner v.
Baillie.—
Chitty 29.

Reeves D. R.
363, 364.

§ 11. Where an attorney is liable for defamation, see Defamation. Where he may be a witness, see Witness &c.

2 Wils. 325,
Russell v.
Palmer.—

If an attorney do not do his duty in a cause, as if he do not charge the debt in execution as he ought to do, and an action be brought against such attorney by law, the jury may give such damages as they may think reasonable under all the circumstances of the case, without regarding the amount of the original debt lost by his negligence. Where liable or not as to advice.

4 Burr. 2061.
—1 Saund.
312.—Dr. &
Stud. 158.

§ 12. If an attorney at the suit of his client, sues out an illegal writ against a debt. and causes him thereupon to be imprisoned, trespass *vi et armis* for false imprisonment lies as

3 Wils. 368,
Barker v.
Braham.

CH. 15.
Art. 4.

Salk. 89,
Burr v. At-
wood—Salk.
86.—1 Bac.
Abr. 188.

well against the attorney as the client; as where the attorney caused the body of an *administratrix* to be taken in execution, without suggesting she had been guilty of a *devastavit*.

§ 13. If an attorney have a warrant to appear for the pt., in the original action, it is no warrant to appear in the *scire facias* against the bail. This is a different cause; his power continues to judgment and suing out execution within the year, and longer if the execution be continued, but he cannot sue the judgment.

§ 14. By Massachusetts Colony Laws, no magistrate acting in the cause as judge, could be advised with as counsel by either party.

Hob. 18.—
Salk. 87.—
Willes 665.

§ 15. An attorney's power, though made irrevocable, yet it may be revoked, where it vests a mere authority, but otherwise, where it vests an interest, as to confess a judgment to A, where this judgment is a part of his security for a debt. A letter of attorney ceases on the death of him who gives it.

Hob. 117.

§ 16. If an attorney follow a cause, to be paid in gross when a recovery shall be had, it is champerty.

1 Com. D.
628.—1 Sel-
wyn's N. P.
147, Brick-
wood v. Fan-
shaw.

§ 17. It is understood that the act of 3 Jam. I, ch. 7, as to attornies presenting their bills in certain forms to their clients before they can sue, has not been adopted in Massachusetts, if it has been in any of the United States. And in England it has been held, that it extends only to suits in the courts of Westminster hall. Nor have the acts of George II. on this subject been adopted here; hence, the many cases in the English books, arising out of these acts, do not apply here.

3 East 498,
Good v. Wat-
kins.—Chitty
29, 30, 31.

§ 18. An attorney may be empowered, not only by express, but also by *implied* authority inferred from prior conduct of the principal: as if an agent formerly in his principal's absence, usually transacted his business and accepted his bills, and the principal returned and approved of this, he is bound in a similar situation on a second absence from home. So if a wife forbid A passing through her husband's close, and he sues A for doing this, the law implies from this, she had power to forbid &c., as he recognises her act by bringing the action. And one is bound by every act of his *general* agent or attorney, although he exceeds his authority. But as his power is not coupled with an *interest*, he cannot delegate it, unless expressly impowered so to do, and he must mention he acts as *agent* &c. except he be a *government* agent. If such a one contract for its use, he is not personally liable, though the contract be under his own hand and seal; but it is conceived there must be reason to presume the contractee knew he was acting as public agent; or good reason to believe he was so acting. In the body of the indenture Dexter was described as *secretary of war*, but he signed his proper name only.

1 Cranch R.
343, Hodg-
don v. Dex-
ter.

§ 19. To bind the principal by *deed*, the attorney's power must be by deed; but his *deed* is good against himself. Nor can one partner bind another by *deed*, unless he be present and assenting, even though the *deed* respect their partnership concerns. Hence, "an attorney who is only authorized by *parol*," cannot make "a *feoffment and livery*," or a lease for years. No set form of words are necessary in his signing. 2 East 142. CH. 15. Art. 4.

§ 20. This was covenant on a *charter-party*. The *deed* was executed by G. Dwyer, by order and for account of Rush & Tilson, and it was held to be void, because Dwyer had only a *verbal* authority to execute the *charter-party*. When an attorney in an action may cease to be one. 13 Mass. R. 465, 469. Harrison v. Jackson, 7 T. R. 207.— Watson's Part. 160, 162. See 3 Bac. Abr. 408. Watson on Part. 162, Horsely v. Rush, Ch. 20, a. 20.

§ 21. It seems to be a settled principle, that to make a *deed* by attorney, he must be appointed by deed.

§ 22. If one endorsed his name A. B. on an execution, as attorney to the creditor, it is no evidence he was attorney.

§ 23. This was case against the deft. as an attorney, stating the plt. put a certain note into his hands to collect &c., that he retained the deft. &c., directed him &c., that he so carelessly and negligently conducted the business, that the plt. lost the note &c. Judgment for the plt. And the principle settled was, that whenever an attorney disobeys the instructions of his client, and a loss ensues, the attorney is liable for it. Watson on Partnership 162. 1 Mass. R. 483, Hart v. Waterhouse. 8 Mass. R. 51, Gilbert v. Williams. Also 15 Mass. R. 316.

§ 24. Several matters &c. Supreme Court of the United States does not allow counsel's fees, in estimating damages on which a decree is founded. If a counsel stipulate in a cause, it is as effectual as if done by the attorney on record. One who has practised three years as an attorney may be admitted a counsellor: and in admitting one, *alienism* is no objection, he only takes an oath of office. A counsellor is entitled to privileges, (in New York) and hence must be proceeded against by bill. In Massachusetts, counsellors only can argue issues in law and in fact, and law questions arising on writs of error, *certiorari*, and *mandamus* on special verdicts, on motions for new trials, and in arrest of judgment. Counsellors may practise as attorneys. 3 Dallas 306. —2 Caines' R. 260.— 2 Caines' R. 261, 386, 387.

An attorney's practice of having different offices in different places is improper. 6 Mass. R. 382.

§ 25. In England, an action cannot be brought on an attorney's bill, until a month after it is delivered to his client. How signed, delivered, &c. 5 D. & E. 694; 2 Bos. & P. 343; 1 H. Bl. 291; 6 D. & E. 645, 646. And if so delivered a proper time before sued, and not referred by the client for taxation, he cannot on the trial dispute the reasonableness of the charges. See the laws of *Louisiana* on this subject, en- 4 Johns. R. 191. Loft 341.— 1 Dougl. 198. 2 Bos. & P. 237.

CH. 15. acted on the principles on the French law. Civil Code of
 Art. 4. Louisiana 421 to 426, book 3, title 13, making several good
 distinctions.

11 Johns R.
 119, Waring
 v. Yates.—
 1 D. & E.
 136.—7 Do.
 474.—8 Do.
 679.—
 2 Saund. 291,
 n. 1.

§ 26. *Attornies in New York may be sued by bill &c.*

Assumpsit. The bill against the deft., an attorney of the Supreme Court, was filed in it in the vacation as of the first Monday in August 1812, in which the promise was said to have been made September 1, 1812; and held bad: by this as by many other cases, it appears an attorney of the Supreme Court is originally sued in it, and a declaration filed as of the preceding term on a promise made after it, is bad on demurrer, hence the day of the filing should be mentioned. Tidd's Prac. 767; Ch. Pl. 259, 263, 264, 265. See Cheetham v. Lowes. Then it may be proved as 28, below.

10 Johns. R.
 463, Gibbs v.
 Loomis.

§ 27. Action of trespass, assault, &c. against an attorney of the Common Pleas &c.; he plead he was suable only in that court, except as to the rights of the people. Held, his privilege from arrest by process from the Supreme Court was confined to his necessary attendance on that court and Common Pleas. So *attornies of all inferior courts*, they have no perpetual exclusive privilege as against the jurisdiction of the Supreme Court.

10 Johns. R.
 218, Sabin v.
 Wood.

§ 28. Bills against attornies may be filed in the vacation. And the suit is deemed to commence only from the time of filing the bill; and though filed generally, of the term the plt. at the trial may shew when the cause of action arose, and if after, bad on the rule 26 above relied on, 2 Stran. 1271; 3 Burr. 1241; 1 Caines' R. 69; 5 D. & E. 325, which to promote justice, allow a fiction to be contradicted &c. In fact, New York and several States have allowed to their attornies the English privileges.

10 Johns. R.
 220, 222, Kellogg v. Gilbert.

§ 29. *Attorney General's power does not enable him to discharge a debtor.* As where the deft. was in custody on a *ca. sa.*, the plt's. attorney on record, without satisfaction of the judgment or the plt's. consent, desired the sheriff to permit the deft. to go at large to obtain means to pay &c., and the sheriff knowingly allowed the deft. to go at large. In debt against the sheriff for an escape, held the plt's. attorney, from his general character had no authority to order the deft's. discharge, without the plt's. consent, or a previous satisfaction of the debt, and the sheriff was liable for an escape; same, 8 Johns. R. 361, 367; till judgment obtained the attorney has large and liberal discretion, but he cannot enter a *retraxit*, as it is a perpetual bar, and equivalent to a release, said the Chief Justice. Baker's case, 8 Co. 58. "And the admittance of the court," said the court in that case, "cannot prejudice the plt. in so high a degree, but in all dilatory matters the admis-

sion of the court may turn the plt. or demandant to delay, but shall never bar the plt. or demandant." See 2 Roll. R. 62; 1 Salk. 89; 6 Mod. 82. The act of New York (Sess. 34, c. 196) says, such discharge must be done by the party or his attorney "*thereunto lawfully authorized.*"

CH. 16.
Art. 1.

§ 30. *Power of attorney to make a deed of land presumed after forty-two years quiet possession &c.* As in ejectment the plt. sued in 1809, and shewed title by a release made in 1767, in *partition*, to $\frac{1}{4}$ ths of the land sued for, and proved by witnesses, that all the lots in the patent so divided, they were acquainted with, were held according to that partition; and no outstanding title appearing in the two remaining patentees, the court held; first, it might legally be inferred the lessors had a perfect title to the *whole*. Second, where a deed, dated May 14, 1767, recited that several of the grantors conveyed by K. Y. their attorney &c., in 1809, after forty-two years, and an acquiescence in the titles under that deed, deemed said power was valid, though not produced, or any proof it was executed. Third, possession of a lot of land, commenced *adversely* twenty-five years before the suit, by clearing four or five acres, not shewing what part, and no regular tracing title or privity, and continued possession to the deft., does not prove *adverse possession* to bar the plt.

10 Johns. R. 475, 478, Doe v. Campbell.

See Ch. 94, a. 9, s. 7, same principle.

Ch. 104, a. 4, s. 6, like principle.

§ 31. He is not bound to proceed, unless his fees are paid or secured, nor unless his client pays his costs; he is not bound to spend money for his clients &c. without being secured.

2 Johns. R. 296, Castro v. Bennet.

§ 32. Where an attorney undertakes to appear for a party in a cause, the court will look no further as to his authority.

5 Johns. R. 34. See Salk. 86.

CHAPTER XVI.

ACTION OF ASSUMPSIT. SALES AT AUCTION.

ART. 1. § 1. In sales *at auction* there are some things peculiarly to be attended to. In these sales an auctioneer may sell the goods of another, and sue for, and treat them as his own. Therefore, if an auctioneer at my house sells my goods, yet he may have an action against the buyer for goods sold and delivered, though the goods are known to be mine, and not the auctioneer's. And Lord Loughborough and other judges have proceeded on the ground, that an *auctioneer* "has a possession coupled with an interest in goods, which he is employed to sell, not a bare custody like a servant or a shopman, whether the sale be on the premises of the owner or in a pub-

Imp. M. P. 203.—1 H. Bl. 88, Williams v. Wiltington. See Ch. 11, a. 4, and 6.—Cowp. 255.—Burr. 1921.—1 T. R. 619, 622.—2 W. Bl. 996.—Bul N. P. 280.—2 Burr. 1006. Bull. N. P. 130.—1 T. R. 20.

CH. 16. lic auction-room." "*An actual possession is given to the auctioneer*;" he "has also a *special* property in him with a *lien*

Art. 1.

See Ch. 32. a.
9, s. 9.

Cowp. 395,
Bixwell v.
Christie.—
1 Com. D.
171.—1 Sel-
wyn's N. P.
155.

for the charges of the commission &c." "He is agent for each party in different things, but not in the same thing. When he prescribes the rules of bidding and the terms of the sales, he is agent for the seller; but when he puts down the name of the buyer, he is agent for him only," by his consent.

§ 2. *The auctioneer* is not liable to the owner's action for selling his goods at the highest bid, though against the owner's express direction, not to sell under a certain sum he names; for it is one of the essential conditions of an auction, that the thing be sold to the highest bidder. And there is no way to guard the owner in this respect, except one, he may direct the auctioneer to set the goods up at such a price; but the owner's order not to sell under such a sum, is not an order to set them up at such a sum.

5 Mass R.
516, Clark jr.
v. Cashman.

§ 3. In this case our court decided, that if one be sued for the penalty of the act of 1795, for selling his own goods at auction after sunset, he is not estopped to deny, that he was regularly licensed as an auctioneer. Also, that the license to one must be granted at a meeting of the selectmen, or a major part of them, had for that purpose, of which meeting all the selectmen must have notice. The evidence in this case was the testimony of two of the selectmen who signed the license, and the act expressly provides, that the license be given "*at a meeting had for that purpose*," of the selectmen. This license was signed by two of them, not at such or any meeting of them, and there were three selectmen. Laws of Maine, Ch. 139.

6 T. R. 642,
Howard v.
Castle.—
Cowp. 395.

§ 4. An *under-bidder* or puffer at an auction, is a fraud on the fair bidder, if not made known; and the highest fair bidder cannot be held to complete the contract; and the principle is the same whether goods or real estate be sold. New. on Con. 219, 223, same principle; but held in equity, the buyer is held if the fair bidding is continued after puffing ceases. See 3 Ves. 620. But the owner may bid, if before the auction he gives notice publicly of his intention to bid. 2 Bro. C. C. 326; 3 Ves. jr. 630; 12 do. 477; 2 Haywood's R. 326, a. 2, 5, 6, &c.; 12 Ves. jr. 483.

9 T. R. 93, 95.
—1 Selwyn
156.—3 D. &
E. 93.

3 Ves. jr. 620,
Bramley v.
Alt.—5 Ver.
jr. 508.

§ 5. But there may be an under-bidder in some cases, though known only to the auctioneer. As where one bid £75 an acre for land, and then real bidders run it up to £101, 17s. an acre, and it was held that the sale was good; but that it had been otherwise had all the bidders been puffers but the purchaser. This case was in chancery. The £75 bid had no material effect to deceive or to raise the price.

§ 6. By this act, sales at auction, and the duties to be paid at them, were regulated throughout the United States, but this act was repealed in 1801. Act of Congress June 9, 1794, & July 24, 1813.

§ 7. It is not known that the question respecting an under-bidder has arisen in our practice, though it has been a very common case to employ one, and not to make the circumstance known, and very often this under-bidder has bid alone against the *bonâ fide* bidder.

§ 8. If the highest bidder retract his bid any time before the hammer is down, he is not liable to an action under the usual conditions that he shall be the purchaser; for "the auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding, and that is signified on the part of the seller by knocking down the hammer." 3 T. R. 148, Paine v. Case, & 1 Selwyn 154.

§ 9. The auctioneer is liable to the action of the highest bidder for the deposit, where such bidder has sufficient reasons for not proceeding, and the auctioneer ought not to part with the money till the sale is completed; but where the title is not good, the bidder can have an action only to recover back his deposit with interest; and any sum paid and accepted, as earnest, binds the bargain, and is part of the price. Imp. M. P. 183.—5 Burr. 2639. Burrough v. Skinner.—2 W. Bl. 1078, Flureau v. Thornhill.—1 Selw. 159. 1 H. Bl. 289, Gunnis v. Erhart.

§ 10. At sales at auction the printed conditions are material, and govern the case; therefore if the auctioneer make verbal declarations inconsistent with them, these declarations will not control the written or printed conditions. 3 Dallas 416, Clarke v. Russell; same principle in N. York, 11 Johns. R. 555; 12 East 6.

§ 11. If money be paid as a deposit, though less than is required by the conditions, and accepted as such by the auctioneer, it will, as to him, bind the bargain; and he is personally liable where he does not name his principal. 12 Ves. jun. 352, 484, 378. 1 Selw. N. P. 154, Hanson v. Roberdeau.

§ 12. *Assumpsit* for money had and received, to recover a deposit paid by the plt., a purchaser at auction of an annuity sold by the deft., an auctioneer. One condition was, that a good title be made out by July 10th, and it was held by Kenyon C. J., that the seller ought to be prepared to make out his title on that day. The purchaser in this case has a right to inspect the deeds, though not to keep them. Judgment for the plt., as the seller had failed in completing his engagement. Berry v. Young, 1 Selw. 160, 161.

§ 13. The same principle was adopted by the same judge in regard to a real estate sold at auction; and further, that the purchaser has a right to recover back his deposit, if the title be not made out at the day appointed for that purpose, though the seller may be able to make it out afterwards. Verdict for the deposit and interest, and in another case it was said, there must be a special count for interest, as it cannot be re- 1 Selw. N. P. 160, 161, Cornish v. Rowley.

CH. 16. covered on a general count for money had and received ; and
 Art. 2. there cannot "be any further damages for the supposed good-
 ness of the bargain," recovered.

7 East 558,
 672, Hinde v.
 Whitehouse
 & al.

§ 14. Sugars in the king's warehouse sold at auction. The auctioneer informed the bidders the duties would be paid the next day ; bidders' names noted by him as buyers, and samples, half a pound to a hogshead, were delivered to them, and prices bid, noted ; samples accepted as parts of the purchases. Held, the sale valid, and property changed at common law and on the statute.

6 Mass. R.
 166, Penni-
 man v. Rug-
 gles & al. &
 trustee.—A
 sale by
 loan offi-
 cers at auc-
 tion is within
 the statute of
 frauds,
 Caines' Ca.
 in Ex. 301.

ART. 2. *American cases &c., Mass. Act, June 16, 1795, Feb. 21, 1820.*

§ 1. In this case Jutau, an auctioneer, was employed by a deputy sheriff to sell goods attached of the debt's. on execution against him, and advertised by the officer. Jutau sold them, and when summoned as trustee, had the proceeds in his hands, and was informed by the officer for what purpose. Jutau was discharged, for he was the mere agent of the officer, and there was no privity between Jutau and the debt., and he can have no knowledge of the rights of the parties, and is accountable only to the officer ; and it was added by the court, that the plt. should have summoned the officer as trustee, "from whom might be obtained the facts necessary to form a correct judgment."

Saunders v.
 Delano & al.,
 Mass. Essex,
 Nov. Term
 1810,
 5 Mass. R.—
 1 Saund. 320,
 Fordage v.
 Cole.—
 1 Esp. 15,
 Langford's
 case.—1 Esp.
 15.—1 Salk.
 113.—1 Cox
 194

§ 2. If A and B purchase lands at auction, on written conditions to pay \$1000 earnest down, and \$1000 in two months, and another \$1000 in four months, and give their negotiable note to the plt., the auctioneer, for the said earnest, payable on demand, to have a deed when they shall have completed their payments, and they fail to pay the second and third sums, they will be held to pay the whole of said note ; for the purchase fails by their fault, and the note is the earnest money, and payment of it bound the bargain, and was part of the price ; hence, when earnest is given, the vendor cannot sell to another, unless there be default in the vendee. 4 Vesey jun. 720.

1 Esp. 15.—
 1 P. W. 745,
 Saville v.
 Saville.—
 1 Selw. 159.
 —5 Burr.
 2639.—2 W.
 Bl. 1078.—
 1 Bos. & Pul.
 309.—2 do.
 472.—See
 Earnest, Ch.
 11, a 2 & 6.

§ 3. "But where a deposit has been made, it should seem that if the vendee does not perform the bargain, he shall forfeit such deposit, which is the rule in equity."

\$1000 earnest forfeited ; and it is a general rule that an action lies to recover back earnest money, paid at auction or otherwise, only when there is some fault in the seller of the goods or estate, or in his title ; upon any other principle, the purchaser would be allowed to take advantage of his own negligence and wrong, and to rescind a contract where the fault is all on his side.

Harris v.
 Elliot, Mass.
 Court, Essex,
 1812.

§ 4. If the purchaser at auction of an equity of redemption, or of other estate, make a conditional bid, as if he had on

condition the deft's. wife has released her dower in the estate, \$1000, and it turns out that she had not released it, he is not held, though the highest bidder, and the equity be knocked off to him, and though he might have known whether she had released it or not, by examining the registry of deeds. And so the highest bidder is not held, if the vendue-master or auctioneer make to him any material misstatements. What is a sale of goods to change property, see Ch. 139, a. 8, s. 9.

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Art. 2.



§ 5. A and B proposed to buy goods together at a public auction, but not to bid against each other; it was agreed between them that A should bid off the goods, and B have one half. A accordingly bid them off, and refused to allow B one half. In action by B against A., held, the action did not lie, for the agreement was without consideration and void, and also against public policy. Like case 3 Johns. R. 29, Jones v. Caswell, Jackson v. Catlin; 2 Johns. 248; 8 do. 50, in court of error. Sales at auction are within the statute.

6 Johns. R.
194, Doolin
v. Ward, cit-
ed Sugd. Ven.
17.

§ 6. A contract for making a road was at auction, and the plt. and deft. agreed that one only should bid, and if struck off to him the other should have an equal share in it. Being struck off to the deft., the plt. sued him for breach of contract. Judgment for the deft., for there was no consideration, and so the contract was void, and a fraud on the vendor.

8 Johns. R.
Wilber v.
Howe, 444.

§ 7. Error to the Circuit Court, Columbia. Case for not paying the purchase money he, the deft., bid at auction for a house the plt. sold to him. The terms were, the purchaser within thirty days was to give his notes, with two approved indorsers, and if he failed to do so in that time, then the estate to be re-sold on his account. Held, the vendor could not sue the vendee for breach of contract, until a re-sale had ascertained the *deficit*, for so were terms at the public auction; and second, it made no difference if the vendee, the deft., afterwards instructed an attorney to draw a deed, in pursuance of the bid. Other sales at auction, see Ch. 11, a. 4, s. 11, a. 6, s. 13.

7 Cranch
399, Webster
& al. v. Ho-
ban.—2 Taun.
268, Roberts
v. Wyatt.

§ 8. Declaration against an auctioneer for not accounting for goods delivered to him to sell. Bul. N. P. 147, Wilkyns v. Wilkyns; 6 Atk. 89; Salk. 9, Tattersall v. Groote; 2 Bos. & P. 136, Barker & al. v. Thorold. So against a vendor of an estate at auction for not making a good title. Cites 2 Esp. R. 640; ib. 641, Berry v. Young.

2 Ch. on Pl.
123.—1 Sann.
50.—2 Ch. on
Pl. 124—
Kirby 14,
Hobbs v.
Finck & al.

§ 9. Lands are advertised to be sold at auction, and the advertisement states the conditions of sale; this is a writing signed by the vendor.



CHAPTER XVII.

ACTION OF ASSUMPSIT. BAILMENTS.

See Trover.
Pow. on Con.
246.—See a
declaration
suited to
each kind of
bailment,
2 Ch. on Pl.
104, 116.

ART. 1. *General principles.* § 1. The bailment of property is the foundation of many actions, and among others those of *assumpsit* principally. The general principle is, that whenever a man has by any means the keeping of another's goods, the law implies a contract, and the bailee is bound to take care of them, according to the nature of the bailment. As if cloth be delivered or bailed to a tailor, to make up, he has it on trust, an implied contract, to render it again when made, and that in a workmanlike manner.

3 Salk. 11.—
Ld. Raym.
909, 920.—
Pow. on Con.
247, 255.—
2 Bl. Com.
262.—1 Bac.
Abr. 236,
246.—Jones
10, 16, 81,
82, &c.—
Salk. 26,
same case.
Depositum.
Bul. N. P. 72,
73.—Dr. &
Stud. 222, &c.
Stra. 1099,
Mytton v.
Cock.—Pow.
on Con. 248.
—Willes 118,
Kettle v.
Bromsell.

§ 2. Since the leading case on this head, of *Coggs v. Bernard*, stating six sorts of bailment, this same division has been adopted and pursued by many law writers, as Powell, Bacon, Blackstone, Buller, and most other elementary law writers on the subject. This division has, on the whole, been found to be the best that has been adopted, and under one or the other head every case nearly may be arranged. The several divisions formed in that important case appear to be these, taken mainly from the civil law.

§ 3. *Of deposit.* As if I deposit my goods with J. S. to keep for my use, and he has *no reward*, he impliedly engages to keep them with care, and to answer for his *gross neglect*. And no action lies against him if he keeps them as he keeps his own, though he keeps his own negligently, for I know whom I trust; and if he gives a writing to re-deliver them, it makes no difference.

In this case the court took a difference between goods delivered to be kept safely, and goods delivered to the bailee to be kept as his own goods are kept. This distinction will be further considered in future articles. See Civil Code of Louisiana, page 410, 412, 414.

Co. L. 85.—
2 Bl. Com.
453.—4 Co.
84.
Pow. on Con.
252.—2 Stra.
1099.

§ 4. Formerly it was held the bailee in this case of a deposit, was answerable in all events, even if stolen, or taken away by force and violence, in the English law.

ART. 2. § 1. In one find my goods, and has no reward for keeping them, he is answerable only as above, for his due care. This due care is to be viewed as a moral duty, he ought to perform without reward, whenever he consents to be the keeper of another's goods; but beyond this care he ought not to be liable without some reward for his further care and attention.

Commodatum.

§ 2. If I lend my horse to a bailee *gratis*, to be used by

him, he has a benefit by the use, and the law implies he engages his utmost diligence to keep and return him, the least negligence will make him answerable; but if I lend a thing solely for my pleasure or profit, on the same principle he is liable to an action only for his gross negligence, for where the benefit of the loan is his, there is a reward, a consideration for an implied undertaking to keep the thing safely, otherwise if he have no benefit. *Mutuum*, a loan to be returned in kind, as money, grain, &c., is governed by the same principle.

ART. 3. *Of letting and hiring*.—§ 1. If one hire goods of me to use himself, the law implies that he engages to take the *utmost care* of them, and to restore them; but if they be stolen from him, he is not liable, per Holt C. J.; but if the bargain, as *hiring* implies, is *mutually beneficial to both parties*, the bailee, according to the latest and best authorities, and the reason of the case, is only required to take *ordinary care*; for in this care there does not appear to be any particular reason for the bailee's being viewed as an insurer, or for his engaging, beyond his due care, and the hire he pays is a *quid pro quo* for the benefit he receives; and so it is to the bailor, for the inconvenience of being out of the possession of the thing, and the use of it; and if the bailee take due care of it *as of his own*, there is no greater risk to the bailor than there would be if he had it in his own possession. *Locatio* or letting is on the same principle as *conductio*.

ART. 4. *Of pledges*. § 1. If I *pledge* or *pawn* my goods to A for money lent me, he must use *due diligence* to preserve them, and if he retain them after the money is *paid or tendered*, he is a wrong doer, and is answerable in all events. As pledgee has a *special property* in the goods, and cannot use them, if they be the *worse* for using; if not the *worse* for using, still he uses them at his peril. As if jewels be pawned to a lady, and she keep them in a bag with *ordinary care*, and they are stolen without her fault, she shall not be charged; but she shall be, if she go with them to a play, and they are stolen; she makes advantage of them beyond the intent of the pawn, at her risk; so she too exposes them, and on this account also, she ought to run the risk.

§ 2. If the pawnee be at a charge in keeping the pawn, he may use it for his reasonable charge; if he keep the pledge diligently and lose it, still he shall recover his debt.

§ 3. And if one recover judgment against me, he cannot take my goods in execution, pawned to J. S. until he is paid.

§ 4. If I pawn goods to J. S. redeemable at a *certain day*, on failure of payment his property is at law absolute, and he may sell them; and if I pay him in time, and he refuse to deliver them, he may be *indicted*, for the goods being *secretly*

Сн. 17.
Art. 4.

Locatio et conductio.
Ld. Raym.
916.—
Jones 121.

Pignus,
See also Trover & Liens.—
Pow. on Con.
252.—
13 Mass. R.
105.—2 Salk.
522.—Bul. N.
P. 72, 168.—
3 Salk. 268.
—4 Co. 83.—
Jones 106,
106.—3 Salk.
268.—Civil
Code of Louisiana 446, 450.

Bul. N. P. 72.

3 Salk. 267.
—2 Salk. 522.
—1 Bac. Abr.
228.—2 Esp.
341, 347.

CH. 17. pawned, it may be impossible to prove a delivery, for want of witnesses in the case of an *action*. A factor cant pawn, see Factor, ch. 30.

Contra.—
2 Cain. Er.
200.—
My heirs may
redeem.—
Cro. Jam. 245,
Ratcliff v.
Davies.—
2 Bl. Com.
396.—2 Ves-
sey jun. 278.
2 Esp. 248,
Demastry v.
Metcalf.—
Prec. in
Chancery
419.—2 Vern.
691.—Salk.
236.

T. R. 376,
Hoare v.
Parker.

6 T. R. 175,
Parker v.
Patrick.

Bul. N. P. 168.
—Co. L. 209.
—Stra. 919.

Dyer 49,
Lyde & ux. v.
Perry.

§ 5. If I fix *no day* of redemption, and die, the pawn is absolute, for I have during life to redeem, and then am limited to my life time; but if he dies, it may be redeemed, as the time of redemption is not governed by the continuance of his life. "The pledger's property is *conditional*, and depends on performing" the condition; so the pledgee's property is *conditional*, and depends on a non-performance; so of goods distrained, being in the nature of a pledge.

§ 6. Pawning in itself creates a *lien*; as where a testator borrowed money on jewels, and afterwards borrowed three other sums, for each of which *he gave a note*, without taking any notice of the jewels. The court held, that the lender had a *lien* on the jewels for the three sums, and that the borrower's executors could not have the jewels without paying all the sums. For it must be presumed, that the pawnee trusted to the pledge he had in his hands, by the money being lent *subsequently* to the pawning, which excluded the presumption of any trust to the *person*; but if the loan had been *prior* to the pawning, there had been *no lien*.

§ 7. But though the pawning creates a *lien* in favour of the pawnee, he cannot have more interest in the thing pledged than the pawner had. As *if tenant of plate for life* pawn it to a broker and die, and he have no notice of the pawner's property, the pawnee has *no lien* on the *plate as against him in remainder*.

§ 8. Yet it has been decided, that if A gets my goods *by fraud*, and pawns them to B, an *innocent* person, and for a *valuable consideration*, I cannot recover them of B, till his debt is paid; but no doubt, B must be perfectly innocent, and receive them without any kind of suspicion that A came unfairly by them; the reason must be that I or this *innocent* person must sustain a loss, and it is more reasonable I should than he, for the case goes on the ground he is *entirely* innocent, but I am not, for there must be some negligence in me in suffering one to get possession of my goods, and making this *fraudulent* use of them.

§ 9. If the pawner (after tender and refusal) recover the goods in an action of trover, yet the pawnee may have an action for his money, for the duty or debt will remain; so if the *pawn* be stolen or perish without his fault.

§ 10. *When the bailor may countermand.* A bailed money to B, to the use of C, to be delivered at his marriage; A may countermand this money at any time before it is delivered over to C, for A's delivery was without consideration; otherwise,

had the delivery been to pay a debt due to C, or founded in mutuality : this was a gift, and a gift though *commenced* is of no force until it be completed and agreed to. And A's delivery to B was also *conditional*, and a conditional gift is revocable until the condition be performed. But if A give goods by *deed* to B, and deliver the deed to C to B's use, the goods are his immediately, before notice or agreement ; for by the gift by *deed*, a consideration is implied or intended.

CH. 17.
Art. 4.

3 Co. 26, Buller v. Baker.

So if I owe A \$100, and deliver goods to B to pay that debt, the property is immediately altered, and B may sell the goods. In this case also there is a consideration.

Dyer 40, in Notes.

§ 11. *What a pledge, and not a mortgage.* Walker brought *trover* in the Common Pleas, against M'Lean & Prince, for a promissory note, dated Sept. 2, 1808, made by A. & T. Wilber, by which they promised to pay Walker 200 bushels of merchantable wheat at Utica, Feb. 20, 1811, value \$200. Plea, not guilty, with notice of special matter to be given in evidence at the trial. February 4, 1809, the plt. and defts. made an agreement, by which he delivered to them said note, and he agreed if the wheat did not sell for \$200 he would make up the deficiency to them, and they, by said agreement, gave him power to redeem the note on paying \$186 with three and a half per cent. interest, within six months of the time the note became due. Held, the note was deposited as a *pledge*, and not as a *mortgage*. 2. A tender by Walker of \$200, on or before the day the note fell due, was sufficient to entitle him to a return of it. 3. On such tender and refusal by M'Lean & Prince, Walker might have *trover* for the note. The plts. in error, to prove it a *mortgage*, cited 2 Caines' Cases in Error 202 ; 6 Johns. R. 258 ; 8 Johns. R. 96 ; 2 Ves. jr. 378 ; 1 Pow. on Mort. 3 ; 1 D. & E. 153. And as to *parol* evidence offered to prove a *mortgage* and not a *pledge* was intended, it was rejected, cited, 3 Johns. R. 319 ; 4 Johns. R. 285 ; 8 Johns. R. 116, 375 ; Peake's Evidence 116 ; 1 Johns. Cases 22, 145 ; Bul. N. P. 297, 398. To prove it a *pledge* and not a *mortgage* were cited, Cortilyon v. Lansing, 2 Caines' Cases in Error 202. *Curia*, here was no *sale* of the note. The property in it was not intended to pass until after the default, "it was merely *deposited* with party, and the *legal property* did not pass, as it does in case of a *mortgage*."

10 Johns. R. 471, 475, M'Lean & al. v. Walker, in error.

§ 12. *When goods are sold and not bailed.* If A deliver 100 bushels of wheat to B at his mill, and B agrees there to deliver to A twenty barrels of flour therefor, to be made of any wheat B has, and B mixes the said 100 bushels with the wheat of other persons or his own, so that said 100 bushels can never after be distinguished ; this is a *sale* of the 100 bushels to be paid in flour, and not a *bailment*, for B may im-

CH. 17.

Art. 7



Mandatum.
Acting by
commission.
See Jus. Inst.
L. 3 T. 27.

mediately dispose of this wheat, or use it, and he is accountable but for the flour. Also when a thing is bailed it must be kept separate, or so as that the *very thing* bailed may be returned as it was when received; or if to be wrought into a new form, so as that the *very materials* may be returned. The principle is clear; hence, in the case in 19 Johns. R., *Seamour v. Brown & al.* there was a *sale* and not a *bailment*.

ART. 5. *Of goods delivered to be carried &c. for a reward.*

§ 1. If I deliver my goods to J. S. to be *carried*, or to *do something with them for a reward*, he is answerable according to his employment. If a common carrier, common hoyman, a master of a ship, or one who uses a *public* employment for a reward, he is answerable at all events, except as to the *act of God* or *public enemies*.

§ 2. If goods be delivered to bailees, factors, or other persons, exercising a *private* employment, *for a reward*, they engage to do the best they can with them to preserve the property. And there is a reward wherever the *bailee has a profit*, either in a sum of money agreed, or in the way of his business, as the taylor, factor, &c. in his work, by way of exchange, or any other consideration, as also the use of one's horse or plough without paying any hire, or the use *gratis*.

ART. 6. *Or to be carried &c. without a reward.* § 1. If I deliver my goods to J. S. to be *carried*, or something to be done about them, *without any reward*, and he behaves *negligently*, he is liable. If he undertake *generally*, he is liable only for his *gross neglect*, but if expressly to do such an act *safely* and *securely*, he is liable for any damage happening by his miscarriage, for he undertakes and is trusted on these terms. If A deliver goods to B, *to keep safely*, B is answerable for them to A in detinue, though he be *robbed* of them, but otherwise, if delivered *to B, to be kept as his own goods &c.*; but even in such case he is liable for damages, arising from *his neglect*, cited 2 Stra. 1099, *Mytton v. Cock*.

§ 2. In all these cases there is the implied promise of the bailee before stated, and if he break this, *assumpsit* lies, and in many cases also some other action, as detinue &c. And in all these cases the bailee has a *special qualified property* with the *possession*; and the bailor has left in him only a *right to a chose in action*. Each may support an action against him who injures the goods, or takes them away; the bailee as being responsible to the bailor himself for them. But then it must be considered what is *possession*, for if I leave a *chest of goods with J. S. but keep the key myself*, the *chest* only, not the *goods*, is in his possession, and if stoien, he is not liable. There are, however, some opinions to the contrary.

ART. 7. *Certain principles in these cases.* Bailment is an

Willes 118,
Kettle v.
Bromsell.

2 Bl. Com.
453, 454.—
5 Bac. Abr.
159.—F. N.
B. 89, 92.
See Trover
and Trespass.

Co. L. 89.—
2 Bac. Abr.
206, 207.—
4 Co. 84,
Case of
Southcote.

important article in the doctrine of actions. It is not well stated in the books, and to understand it, its principles must be seen together; the *possession*, as well as *the property of the bailor and bailee*, must be examined. The principle of the bailee's responsibility is a plain one; whenever he keeps my goods and make no *special promise* to make him responsible for them, and has no reward for his keeping them, then he is answerable only for his negligence; but whenever he makes a special promise *to keep them safely*, or has a reward or benefit in keeping them, in that case he is answerable for them in all events, except as to the *act of God and public enemies*. And in many respects all the cases of bailment may be divided into two classes, one in which the bailee is not responsible, but for his *negligence*, and the other in which he is responsible as above. Such benefit or reward, more than a *quid pro quo*, is viewed as a premium of insurance to all purposes but the two stated.

ART. 8. *Possession.* My servant who has the care of my goods, as a *shepherd* of my sheep, a *butler* of my plate &c., has neither *possession* nor *property*, *absolute* or *qualified*, but only a mere oversight, and he cannot sell them, he is not bailee. The same principle holds as to my *money* in my servant's hands.

§ 2. But if a bailee, as an agistor of cattle &c. who has a *possession* and a *qualified property*, give or sell the bailor's goods and *deliver them*, his property is *divested*, but not if there be *no delivery*; the *general property* is changed by the *delivery* of one having *special property*, and the bailor cannot have trover or trespass; when he delivers he has actual possession.

ART. 9. *Property.* Neither the bailor, nor the bailee has the *absolute property*. The bailor has only the *right* and not the *immediate possession*, and the bailee has the *possession* and only a *temporary right*. It is a *qualified property* in each, but sufficient to enable either to support trespass or trover; the bailee because he has the possession, and is accountable for the property or goods to the bailor; and the bailor, because having the right of property that draws to it a possession in law; the bailee has sufficient property in the goods to pass them away by *actual delivery*, and the bailor to recover them in trespass.

ART. 10. *Bailee's reward.* If the bailee have a reward for keeping the goods, and *promise to keep them at his peril*, he is liable in all events; for he is as an *insurer*. But again, if he make such a promise and have *no reward*, the promise is *nude*. He is not liable for accidents; but only for *his default*. He is liable only for *his default*, not for *casualties*, for here

CH. 17.

Art. 10.



2 Bl. Com.
396.—
5 Wood's
Con. 27.—
5 Bac. Abr.
259.

5 Bac. Abr.
159, 259 —
5 Wood's
Con. 27.—
Bro. Tres. Pl.
216, Pl. 296.

2 Bl. Com.
296.

Doct. & Stud
223.

CH. 17. *his reward is only for the trouble in keeping, and not for a premium of insurance.*

Art. 11.

Doct. & Stud. 222. *ART. 11. Bailee's neglect or default.* § 1. If the bailee put the goods into a place or building where *likely* to be damaged, it is a *neglect*.

Jones 20.

§ 2. If money, corn, wine, and such things as cannot themselves if occupied, be returned, but other *like things* be lent to him, he may use these things lent as his own, and if they perish, it is at his hazard, for the loan here is a *sale* of the corn, wine, &c. to be repaid in *like articles*; but if an ox, or horse, or such things as may be used and returned, be *lent* to the bailee, and he may use them in such reasonable manner, as was intended or agreed at the time of the loan, and he use the thing accordingly, and if it perish in the use he is liable only for *his default*, but if otherwise than agreed, then in all events the same principle holds as to hiring. As if one *borrow or hire* a horse for a *certain* journey and time, and use him *carefully*, and as *meant or agreed*, and an *accident* happen to the horse, the bailee is not liable; but if he use him carelessly, he is liable for an injury coming of such carelessness, and if he turn aside from the journey or keep him beyond the time, he is a *wrong doer*, and liable even for an *accident*.

4 Co. 83, case of Southgate.

§ 3. Where the loan is *gratis* the law holds the bailee liable for the least *neglect or default*; for he *has a benefit* by the loan, and *the lender has no hire*; for in this case since the loss must fall on the bailor or bailee, it is more reasonable it fall on the bailee, *who has a benefit* in the use of the horse in the business in which he is injured, than upon the bailor *who has no benefit* in the case: but the bailee in such cases answers not for a mere accident.

So if I deliver goods to one and he accept them to *keep them safely*, he is liable if they be stolen, though *without reward*; not, if in no kind of fault. See Promise without consideration above.

Mass. S. Jud. Court, Nov. Term, 1798, Bradish in review, v. Henderson.

§ 4. This was an action of *assumpsit*, for money had and received, \$260, on these facts, to wit: in Nov. 1795, Henderson was master of a vessel from Salem to New York, and Bradish, a hand on board, when in New York had the above sum in cash, and Henderson proposed to take it and put it under his cabin for safe keeping, to which Bradish agreed, and from which place the money was taken or stolen; and as was supposed by a man named Dutch John. Bradish sued Henderson on this ground, that the money was lost by *his negligence*, and recovered that sum; and on the evidence it appeared, first, that the place was not a safe one; but it was held, that Bradish could not take advantage of this, as he agreed to it as the place of deposit.

§ 4. Second, that as Henderson had no reward for keeping Bradish's money, he was answerable only for his, Henderson's negligence.

CH. 17.
Art. 12.

But, third, it appeared that Henderson one day, when Dutch John, a *suspicious* market-man, was on board, went and took this bag of money from the said place, took out a dollar or two, and returned it to its place, in the presence and view of this Dutchman, and that one night Henderson was out of his cabin &c., and left it exposed till near midnight. The court deemed both of these acts *gross negligence*, and such as made Henderson liable, and especially his so exposing the money. For the court said, the safety of the place of deposit, as far as there was any in it, consisting in its being a place in which probably no person would look for money, and when Henderson thus exposed it to view, and shewed where the money was, he rendered it as unsafe as any other open or unlocked place; that he also rendered the place unsafe by leaving it exposed, and being abroad all the forepart of the night. No default in refusing to deliver goods to A, the property of B, though A had the possession, and delivered them to the bailee. 5 Taun. R. 759, 765.

ART. 12. *The bailee's care and diligence.* The law requires an *ordinary* care, "that is, such as every person of *common prudence*, and capable of governing a family, takes of his own concerns," with some variation in *particular cases*, as the cases before mentioned shew. As if I leave a book with a *careless* man, I can require no more care of him than every *absent, inattentive man of common sense* applies to his own affairs; for I must know whom I trust; but if I lend my horse *gratis*, to one to use, I may require of him the care of a man very *exact and attentive in preserving his own horse*, and that he be not guilty of any slight neglect. The law here views *my loss* and his *gain* by the loan, and implies so much. When the bailment is *mutually beneficial* the *medium is the rule*; and *ordinary* care is implied, and the bailee is liable for *ordinary negligence*. Where *beneficial to the bailor alone*, the bailee is liable only for his *gross neglect* and may be less careful as above, which neglect is *dolo proxima* a want of *good faith*, and of the care even *careless inattentive* men take of their property. This was the Roman law. This *ordinary* care and diligence applies to *equal* contracts, as pledges, sales, partnerships, hirings, joint owners, to deposits, the bailee of his own head and officiously proposes, to such deposits as he is paid for keeping, or has in consequence of some *lucrative* bargain, or when the bailee has a benefit in the deposits.

Jones' Law
of Bailment
8, 9, 10, 16.

Pothier and
the French
Civil Code.—
Jas. D. 50,
17, 23, 10, 6,
5, 2.—D. 16.
3, 1, 36.—
Jones 67.

The *slight* care and diligence applies to common deposits, to findings &c. The *great* care and diligence to borrowings, and things the bailee has *gratis* to his benefit.

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ART. 13. As to *gross negligence*. § 1. It is not to be understood, that when the law punishes only *gross neglect*, it admits *ordinary* or *slight* neglect; this would be absurd. But the truth is, the law requires only *so much care*, and when the bailee has *this* there is no neglect in the eye of the law. When one is at the trouble of keeping my goods *for nothing*, neither law nor reason requires of him even the *ordinary* care and diligence, as above defined.

§ 2. But in a contract, *mutually beneficial*, the above rule is questionable. I let my horse to B for a *reasonable hire*; I have my just dues in the bargain, so has he, but an injury is done to the horse; the loss happens, I or the bailee must bear it; if by pure accident and *without* the least fault or neglect in B, I must bear it. But when a loss thus happens, is to be borne by one of two persons necessarily; law and reason will inquire, if both be equally innocent and without fault, and if one be found to be *wholly without any fault or neglect*, and the other *guilty of a fault and neglect*, though a very *slight one*, yet the law must, and does in such a case, fix the loss where the fault or neglect is, however small; for if it do not, it must throw the loss on him who is wholly without fault or negligence in the case, since he must sustain it, if the other party do not, where there is no dividing it.

Dougl. 669.

Lord Mansfield said, that “when there is equal equity the law must prevail,” “*and the equity is equal between persons who have been equally innocent and equally diligent.*”

Art. 4 above,
and Jones on
Bailments § 9.

ART. 14. *The bailee's keeping the thing, after legally demanded by the bailor, tender, &c.* If the bailee keep the thing after it is legally demanded of him by the bailor, the bailee must answer for *casualties* that happen after the demand, or after he should have restored it without a demand; for in such case, the detention is a wrong, and the bailee is a *wrong doer*, at least, *guilty of negligence*, and of course he never can excuse or justify himself, where his own wrong or negligence must be a part of his defence; and neither law or equity allows one to make a defence, a part of which is his own fraud, fault, or negligence.

ART. 15. *Ordinary care, what.* § 1. One does not take *ordinary care*, when things are *stolen* from him by *stealth*; otherwise, if robbed by *force and violence*. This also was the *Roman law*, the *hirer* uses a horse with *ordinary care*, when he uses him, as a man of common discretion would use his own. So as to keeping, this *ordinary care* is what “every *prudent man takes of his own property.*” One does not take it, when he leaves his stable-doors open, or his bars down. According to the laws of France, one takes *common* or *ordinary* care, when he takes that care a good father of a family usually takes.

10 Hen. 6. c.
21.—Jones 61,
107, 109, 112.
—2 Salk. 522.

§ 2. This appears to be as good a definition of *ordinary* care as can be given. After all, in applying the rule, much sound discretion and judgment are required; and what is the degree of care a good father of a family usually takes, is often a question.

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ART. 16. *When is one's property bailed or sold.* § 1. If I deliver silver to a goldsmith to make me a cup, and it is intended that he make it of that *identical silver*, I bail the silver to him, the property in it remains mine; and if *stolen without his fault*, the loss is mine, for I delivered it to have him *merely work it up, and to return it to me*. But if I deliver the silver to him, and he is to make me a cup of this or any *other* silver, then I *sell* my silver, and it goes in part payment of the cup, for it is no part of the bargain, he works it up for me, and he may do it for *another*; and no part of the bargain that *he return to me the same silver I deliver to him*; therefore, if *stolen*, or consumed by fire, the loss is his. In the first case, if he be *careless in the keeping*, I have my action, not in the last.

§ 2. The French law seems to be the same, and also by that law, if the thing sent be made worse (*deterior*.) by the sole effect of the use for which it was borrowed, and without any fault of the borrower, he does not bear the deterioration.

Book 3, title 15, art. 11, the Civil Code of 1896.

Another article of this law provides, that if, during the loan, the borrower is obliged, for the preservation of the thing lent *to be used*, to be at any extraordinary, necessary and such expense as the lender could not have avoided, he must reimburse it; these are common law principles, and must be law when not enacted into statute law.

§ 3. In these cases of bailment as in almost all others, resting on the *moral faculties of the mind*, the law has ever been substantially the same in all civilized nations, because these, like the instinctive principles in the same race of beings, are the same. In many of these cases, the decision is made by our natural and innate notions of right and wrong; hence in these, common jurymen will generally decide as exactly as lawyers do. Hence we find the Hindoo law as to bailment, four thousand years ago, very exactly according with our present law on this subject; and, because arising mainly from men's *intuitive* perceptions of right and wrong, which are in the main every where as much the same as instinct, or the principles of animal life or of vegetation.

See Halhed's Gentoo Laws 4 chapter; the Roman laws; the laws of France.

ART. 17. *Roman and French laws on this subject.* § 1. On examining the civil code of France, lately formed, it will be found, that it is only a revision of the old laws of France, and that these were, on the present subject, nearly a collection of the *Roman or Civil* law. The following articles from the French

CH. 17. laws, in substance from the Roman, appear to be a plain ex-
 Art. 17. planation of the general doctrine of bailments, as far as it re-
 ~~~~~ spects deposits.

Book 3, title  
 16, art. 1 to  
 49.

The deposit, properly so called, is a contract essentially gratuitous, and only respects *revocable* things. It is *voluntary* and *necessary*; the *voluntary* deposit is by the *mutual* consent of the depositer and depositary, and regularly can be made but by the owner of the thing deposited, or by his consent, expressed or implied, and it can be only between two persons capable of contracting; yet if one, so capable, receive a deposit of one not so, he is held by all the ties of a depositary to restore the thing.

Arts. 3 to 7.

Art. 13, 14,

§ 2. The depositary is bound to keep the thing deposited with the same care that he keeps his own. This rule is applied rigorously, 1. when he has offered himself to receive the deposit; 2. if he has stipulated for a reward to keep it; 3. if made solely for his interest; 4. if expressly agreed that he shall answer for every kind of fault, "*de toute espèce de faute.*"

Art. 15, 16.

§ 3. The depositary is not answerable in any case for accidents, by superior force, at least, if he has not been dilatory in restoring the thing deposited; nor can he use it without permission of the depositer, expressed or presumed.

Art. 18.

§ 4. The depositary ought to restore the thing deposited, to the very person of whom he received it. So deposits of sums of money ought to be restored in the same species in which it was received, either in case of increase or decrease in value.

Art. 19.

§ 5. The depositary is held to restore the thing deposited, only in the state it is in at the time of restoring it, the deteriorations not come by his act, are at the depositer's charge.

Art. 20, 21.

§ 6. A depositary, from whom a thing deposited is taken by a superior force, and who has received a price or something in its place, ought to restore the thing received in exchange; the heir of the depositary, who, *bonâ fide*, has sold the thing deposited, not knowing it was a deposit, is only held to render the price he received, or to cede his right of action against the purchaser, if the price has not been paid. If the property of the thing deposited pass to another, it must be delivered to him, as if a woman deposit, and then marry, the thing must be delivered to her husband.

Art. 33, 34.

§ 7. The depositer is bound to reimburse to the depositary the expenses he has been at to preserve the deposit, and to indemnify him from all the losses this may have occasioned, and he may retain it till paid all that is due to him by reason of it.

Art. 35, 36.

§ 8. The *necessary* deposit is that, one is forced by accident, such as fire, shipwreck, &c. to take; this may be proved by witnesses, and generally is governed by the above rule.

§ 9. Innkeepers &c. are responsible as depositaries, for the effects brought and lodged with them by the traveller, and ought to be kept as necessary deposits; they are answerable for them if taken away or damaged, whether the taking or damage has been done by the innkeeper's servants or domestics, or by strangers coming or going in the inn; but they are not answerable for a theft, or taking by an armed or superior force.

CH. 17.  
Art. 18.

Art. 38, 39,  
40.

§ 10. *Du sequestre* is of several kinds. Is by agreement or judicial. Is by agreement or conventional, when the deposit is made by one or more persons of a thing in dispute, in the hands of a third person, who, after the dispute is ended, is obliged to render it to the person adjudged to have it. It may not be gratuitous; when it is gratuitous, it is subject to the rules of a deposit, properly so called, saving these differences following:—the “*sequestre*” may have for its object not only things moveable, but immovable; the depositary charged “*du sequestre*” cannot be discharged before the contest is ended, but by the consent of all parties interested, or for causes judged lawful. “*Du sequestre ou dépôt judiciaire*,” the law may order it, 1. of the moveables of a debtor seized; 2. of an immovable or moveable thing, the right or possession of which is disputed by two or more; 3. of things the debtor offers for his liberation. This code also establishes a very useful rule, perhaps positive, rather than common law; it is this: If A deposit goods in my hands, and there be reason to think B is the owner of them, I may give notice to B, and appoint a reasonable time for him to claim them; and if he do not, I may deliver them to A, and with him only shall B contest the right, and not with me. This rule seems to be entirely reasonable, for if the owner having due notice, will not in a reasonable time claim the deposit of the depositary, it is right and fit he shall be compelled to contest it only with the depositor, to whom the thing deposited may have been redelivered, and who best knows his title to it. Roman or Civil law consisted of the Institutes or rudiments; 2. Digest, or Pandects; 3. the Code; 4. the Novels or imperial decrees.

Art. 41, 42,  
43, 46, 46, 47.

ART. 18. § 1. Reasons for bringing into one view the essential principles of bailments &c., in *assumpsit*. 1. It is almost universally best to treat of the essential principles of law, on any one subject, in one view and together. 2. Though other actions, as *detinue*, *trover*, &c., depend often on these principles of bailment, yet they are of more essential use and importance in *assumpsit* than in any other form of action. 3. In *assumpsit*, in personal actions, there is a wider field, and more occasion for considering principles of law, than in any other form of personal actions. As the action of *assumpsit*, like

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Art. 1.



other actions, not only involves the principles of law on any subject to which it is applied, but it also embraces more of the principles of equity than any other form of action, and is less entangled with nice and special pleadings. 4. In the usual alphabetical arrangement of actions, it precedes all others except the action of account, which is very limited in its use and application. Hence it is that in considering the action of *assumpsit* on any subject, the essential principles of law, and sometimes of equity, on that subject are noticed, and without doing this, it is generally impracticable, if not impossible, to understand the principles and use of the action.

3 Inst. 66,  
424.

ART. 19. *Pleas*. It is a plea for not returning a horse bailed, he was sick &c. As where the deft. pleaded that at the time the horse was delivered to him, he was sick of various infirmities, to wit., of the glands &c., whereby he was unfit for labour, and he died by occasion of these infirmities, without this that the deft. so violently and enormously rode him, that he died by occasion of that riding, *hoc paratus* &c. The plt. replied that the deft. so violently and enormously rode him that he died as the plt. had complained, and issue. The question in these cases of bailment are, if the horse died by reason of the defts. misuse of him, and this ought to be stated in the declaration; and the sickness &c., is but inducement to the traverse, as in the above case; for the party to whom the horse &c., is bailed by lending, hiring, &c., is answerable only for his proper use of him, and only for his faults in regard to the horse generally, there being nothing in the contract in the nature of insurance of the property.

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## CHAPTER XVIII.


### ACTION OF ASSUMPSIT. BANKRUPTCY.

About 1804.

ART. 1. *Assumpsit*. § 1. Some *bankrupt* cases, especially where a sale of goods is valid or not, the seller being in bad circumstances. As proper bankrupt laws are but little in use, as yet, in the United States, and the country is yet too young, properly to execute them, (though perhaps the least of two evils,) it is not necessary to consider the principles of bankrupt law at large. There are however many decisions to be found in the bankrupt cases, material to shew where the right of property is, even where a system of legal bankrupt laws does not exist. In these cases may be found decided some of the nicest and most useful questions in regard to property, and to frauds, more

especially fraudulent sales of property by men on the point of failing, or in embarrassed circumstances. But many of these questions will be found to have arisen in actions of *trover*, some in actions of *trespass*, and some in other actions, and these cases will be noticed in their proper places. As it will be observed, bankrupt laws are but briefly considered in this chapter, and insolvent laws in chapter 39—laws that so easily run into each other, and which have been so often confounded—it may be proper, in a few words, to notice their origin, and usual material differences.

CH. 18.  
Art. 1.



*Insolvent* laws existed in Rome, under the description of *Cessio bonorum*, whereby the debtor's body was exempted if he did yield up his goods, that is, estate, to his creditors, but his future acquisitions of property remained liable for his debts. Such laws were not necessary in England at all, till the year 1267, nor in any considerable degree till 19 H. 7; for before 1267 there was no imprisonment for debt in England, this was gradually introduced by acts of parliament, passed A. D. 1267, 1283, 1285, and mainly by 19 H. 7., Ch. 9, which last act gave the like process in actions on the case and for debt, as in trespass, that is, imprisonment &c. After this time the kings of England occasionally granted relief in the nature of insolvent acts; but no proper insolvent act was enacted by Parliament till A. D. 1660, and in 1671 this act was re-enacted, and made the first regular insolvent law in England; and this became the model of all after insolvent acts, occasionally passed in England and her colonies, about 40 of which have been enacted in England; these acts have included all classes; most of the colonies enacted them; the great end of which was, usually, to exempt the debtor from imprisonment on giving up all his property to his creditors, leaving his future acquisitions of property liable for his debts.

*Bankrupt* laws grew out of commerce, and it has been stated that the first bankrupt act, 34 H. 8, extended to all persons, and mentioned no discharge, and made bankruptcy criminal. The first proper bankrupt act was 13 Elizabeth, Ch. 7, followed by 21 James 1, Ch. 19, and eleven or twelve others, all confined to merchants; and traders, living by buying and selling. But few of the colonies passed bankrupt acts; but many, insolvent acts, as Massachusetts in 1698, New York in 1755, Rhode Island 1756, &c. &c. Insolvent acts sometimes, though not often, discharged the debtor's property as well as his body; these in principle were bankrupt acts so far; but one distinction has ever existed, that is, an insolvent act has ever operated at the instance of the debtor *imprisoned*, but bankrupt laws at the instance of creditors; further, bankrupt acts have generally discharged the debts of the debtor wholly, and left neither his

CH. 18. body nor future acquisitions of property liable to pay them,  
 Art. 1. though all this seems to have been rather by implication than  
 express law, till the 4th and 5th of Anne.

*Insolvent and Bankrupt laws* are thus materially different, and the difference is most material in our system; for by the Federal Constitution, Congress has power to enact "uniform laws on the subject of bankruptcies throughout the United States," and it has been decided, the several States have power to enact bankrupt laws, when the power is not exercised by Congress; also that the power to enact insolvent laws has ever been left in the State Legislatures, but in both of insolvent and bankrupt laws, this State power must be so exercised as not to violate the 1st art. 10 sect. of the Constitution of the United States, which provides, that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts;" also decided, that imprisonment of the debtor's body is no part of his contract.

Act of Congress, April 4, 1800; under this act the validity of a commission could not be impeached at law by a creditor at the time of issuing it, & who might have opposed the proceedings in their commencement, & in any after stage.  
 4 Day's Ca. 79, Bissell & al. v. Post.

§ 2. At that time Congress passed a bankrupt law, nearly in the words of the principal British statutes on the subject, and in 1804 repealed it. But the repeal did not re-vest any power in the several States to enact bankrupt laws, if they had it prior to April 4, 1800.

§ 3. It was found, as men of reflection must have foreseen, that the United States then were not in a situation properly to execute a bankrupt law, which must ever be a mere instrument of fraud, if not executed with severity enough to restrain the passions, which ever have, and ever will, actuate embarrassed and fraudulent men; this can be done only in old nations, whose habits and feelings are fully reconciled to severe laws, whose execution is very steadily enforced by sound commercial policy; this is not the case in the United States; indulgence is here substituted: and even creditors have often indirectly tolerated fraudulent practices in bankrupts, rather than enforce the mild laws Congress made.

§ 4. It is a fundamental principle in a system of bankruptcy, that the instant one commits an act of bankruptcy, that, and every after act of his, is void, so far that he can make no disposition of his property, but in some special cases. From this principle &c., result several actions deserving notice; some to the assignees; some to the bankrupt; and some to his creditors; several instances of which have been already stated. But a bankrupt's case may be taken out of the bankrupt laws, by the consent of all concerned. Every trader able to contract may be a bankrupt. Cowp. 745.

6 T. R. 134,  
 137, Kaye v. Bolton.

§ 5. As where Bolton's estate was under a commission of bankruptcy, and an agreement of five parts was entered into April 6, 1793, between the bankrupt of the one part, the plt.



of the second part, the commissioners of the third part, the deft. of the fourth part, and the several creditors named of the fifth part, in which agreement the commission was mentioned &c., that the plt. had been elected assignee of the estate of Isaac Bolton, but that the deft. to avoid further proceedings under the commission had, with the consent of the bankrupt, the plt., "and the several creditors whose hands and seals were thereunto subscribed and affixed," and of the commissioners, agreed to pay all the creditors of the bankrupt their full debts, in consideration there should be no further proceedings under the commission, and this agreement was adjudged by the court to be good. To *assumpsit* by several partners, the deft. may plead in bar the bankruptcy of one of them.

CH. 18.  
Art. 2.

8 D. & E.  
140, Ech-  
hardt v. Wil-  
son.

ART. 2. *Bankrupt actions in England &c.* § 1. Actions of *assumpsit* by the assignees, who stand in the place of the bankrupt, invested with all his rights of property, may sue to recover what was due to him, and they may declare as assignees, for all demands due on his contracts before the act of bankruptcy; but for all demands on contracts entered into by him, after an act of bankruptcy committed, they may sue in their own names, for after this he is to be viewed as their agent, and his property in the hands of others, or which comes to him before his certificate is allowed, belongs to his assignees, and may be recovered in their action of *assumpsit*, or other action, as the case may be.

3 Wils. 307.  
—Cowp. 570.  
—1 Esp.  
117, Loans v.  
Mann.

§ 2. A legacy was bequeathed to a bankrupt, when his certificate was complete, except the judge's allowance of it, and it was decided that this legacy belonged to the assignees.

2 Burr 716,  
Tudway v.  
Brown.

§ 3. So an action of *assumpsit* lies to recover back money levied by the sheriff on execution against the bankrupt's goods, issued after he commits an act of bankruptcy, against the plt., at whose suit the execution issued; for by the act of bankruptcy the property of the goods vested in the assignees. A ship carpenter may be one. A seizure of goods on execution not affected by an after act of bankruptcy of the owner, *secus* as to a seizure after such act committed.

3 Wils. 304,  
Kitchen v.  
Campbell.—  
1 Esp. 118.  
—2 D. & E.  
141.—  
5 D. & E.  
197.—1 Ld.  
Raym. 741 &  
724.

§ 4. May 2, 1785, the act of bankruptcy was committed, but not known to the deft., or any of the creditors. Some months before, the deft. had sold an estate to one A, who paid him for it by a bill of exchange on the bankrupt, payable Feb. 7, 1786. The deft. applied for payment when due, but the bankrupt told him it was not convenient to pay, but he would pay interest. May 22, 1786, the deft. received payment. This money so received, the assignee recovered back in this action, as it was not a payment made in the course of business.

Vernon v.  
Hall.

§ 5. The former assignee removed, the new one may de-

10 East 61.

CH. 18.  
Art. 2.

Dougl. 392,  
Brown ex'r.  
v. Bullen.

clare generally on a judgment recovered by the former one, as assignee duly constituted.

§ 6. In an action brought by a creditor, it was held that the plt. might maintain *assumpsit* against the assignees, under an order for a dividend; and that the proceedings before the commissioners were conclusive evidence of the debt, and as they had power to set off mutual debts, the debt proved and allowed should be deemed the balance. So if the bankrupt promise his creditor to pay the whole debt, he may sue for it, the debt being due in equity &c., there is a good consideration whereon to ground an actual promise.

Bell. N. P. 40.  
—1 Burr. 31.

§ 7. If the assignee gets into his possession property of the bankrupt, not subject to the bankruptcy, the bankrupt himself may maintain an action to recover it, for he is disabled to sue only as to such property of his as comes under the commission, and wherever the bankrupt could have *assumpsit*, the assignee may, and the *assumpsit* relates to the act of bankruptcy.

1 T. R. 166,  
Thompson v.  
Freeman.

§ 8. It is a general principle that if a bankrupt give a preference to a creditor, under an apprehension, though groundless, of legal process, such preference is valid; as when the bankrupt acts to save himself from legal compulsion, and not "merely to favour this creditor, and to give him an unjust preference." This, and many other cases, establish this point, that if a bankrupt prefers and pays a creditor from fear of being sued, though his fear be without foundation, here is no voluntary preference, and the payment is good, though made on the eve of a bankruptcy. For the same reason he may thus pay a creditor, he may secure him. So a debtor may prefer one creditor to another, and convey goods to him to discharge his debt. 1 Cranch 244, Wood v. Owings, and 239, a deed takes effect from its execution, even on the statute of Maryland, and is a deed before acknowledgment.

Stra. 166,  
Atkins v.  
Barwick &  
al.—Bul. N.  
P. 36.—Cases  
cited for the  
plt., 1 Mod.  
76; for the  
def't., Dyer  
49.—2 Rol.  
Rep. 39.—  
2 Leon. 80.  
—Sty. 296.—  
Yelv. 164.—  
Cro. Jam.  
667.—1 Mod.  
489.

§ 9. *Where property is in the bankrupt or not.* The case was thus; the defts. in London, usually dealt with Cripps & Quarmer, living at Penryn in Cornwall. April 7, 1715, the defts. sent the goods, and charged them by their order, Cripps & Quarmer then owing the defts. for other goods. May 18, 1715, Cripps & Quarmer, without the defts.'s knowledge, sent the goods to Penhallow, at Penryn, for the defts.'s use. June 4, 1715, Cripps & Quarmer became bankrupts. June the 6th, they wrote to the defts., saying that they, Cripps & Quarmer, had not entered these goods in their books, but had so left them with Penhallow, with an order to him to deliver them to the defts. June 13th the defts. received the letter of the 6th, their first notice of the delivery to Penhallow, and immediate-

ly signified their assent to take the goods again. Judgment for the debts., (trover.) CH. 18.  
Art. 2.

§ 10. And the court said the property vested in Cripps & Quarme, but their delivery to Penhallow to the debt's. use, and to pay them a debt, left to Cripps & Quarme no power to countermand the delivery. *The absolute property passed, as in Buller v. Baker, 3d Co., subject to the disagreement of the parties; "their contract does not stand open till agreement, but is complete unless there be an actual disagreement."* Hence, "the delivery to Penhallow to the debt's. use, before the act of bankruptcy, and founded on a good consideration, transferred the absolute property to the debts. as they never disagreed." "The precedent debt is a sufficient consideration, and it vested before notice, for it being to their benefit, a disagreement shall not be presumed." "Property, by our law, may be divested without an actual delivery, as a horse sold in a stable; but it is otherwise by the Civil Law." "This is a payment in satisfaction," but the case had been different if there had been any fraudulent preference.

By the Court.  
Buller v. Baker, 3 Co.  
Dyer 49.—  
Yelv. 23, 24.  
—2 Cro. 687.  
—Rast. 167.  
—1 Butstr.  
68.—  
2 Caines' R.  
300.

See Bul. N.  
P. 37, Tem-  
ple's case.

§ 11. The bankruptcy of the husband discharges a debt due from the wife, and if the husband and wife plead this, they ought to conclude their plea to the country. The statute of the 4th of Anne discharges from all debts by him due and owing at the time he became bankrupt, and the court held, this was a debt the husband owed when he became a bankrupt. And debts due to the bankrupt's wife may be assigned by the commissioners, who by the statutes are put in the place of the bankrupt, but as to debts he has as executor or administrator it is otherwise, and though a debt to the wife if not collected will survive to her, yet her husband may release it. So he may assign her debt or endorse a note made to her *dum sola*; he has the disposal of a debt due to her without account.

10 Mod. 243,  
248, Miles v.  
Williams &  
ux.

In this case a creditor, knowing his debtor was in bad circumstances, unable to pay his debts, first applied to him about two months before his bankruptcy for security, and took as such part of his stock in trade. The court decided, that in this case there was no undue preference, though the creditor did not threaten to sue the bankrupt in case of refusal. This was a case of trover for books of the bankrupt. *It was enough the creditor asked for security, and that the bankrupt did not voluntarily offer to prefer him.*

6 T. R. 162,  
Smith v.  
Hamilton,  
plt's as-  
signees.

§ 12. After a secret act of bankruptcy committed by one of two partners, the other cannot by endorsement in the name of the firm, transfer negotiable securities which existed before the bankruptcy.

Chitty 1,  
Ramsbottom  
v. Lewis.

CR. 18.  
Art. 6.



1 Johns. R.  
370, Ogden &  
Jackson.

10 East 418,  
Thompson &  
al. v. French.

See Frauds.  
1 Mass. R.  
283, Payson  
adm. v. Pay  
son & al.

When the as-  
signees sue  
the bank-  
rupt's debtor,  
the validity of  
the commis-  
sion cannot  
be question-  
ed.

2 Day's Ca.  
70. Can be  
only by ap-  
plying to the  
judge.

1 Mass. R.  
512, Sullivan,  
assignee, v.  
Bridge.

What is a suf-  
ficient decla-  
ration of  
bankruptcy.  
2 Day's  
Ca. 246.

2 Mass. R.  
374, Self-  
ridge v. Lith-  
gow.

§ 13. If A, a trader, for a valuable consideration, deliver a bill to B, *previously* to an act of bankruptcy, and forget to endorse it, he may *afterwards* endorse. So he may a bill he holds merely in trust. 3 T. R. 111; Chitty 100, 101.

§ 14. If bills be sent to a factor or banker, and remain unpaid, and he become a *bankrupt*, his assignees must return them subject to his lien, they are like goods unsold, the property is not altered.

§ 15. A, B, and C partners, A solvent may join in an action with the assignees of B and C, become bankrupts for a debt due to the three.

#### ART. 3. *American cases.*

*Assumpsit* on a note of hand for \$1600. dated June 20, 1800, payable on demand, made by the deft's. to the plt's. intestate; a year before the bankruptcy the defts. sold two ships, so that they were not assigned to the assignees; the plt. proved his debt under the commission, but received no dividend, and waived all advantages under the commission of bankruptcy, and sued the note and attached these ships. Pending this action the defts. obtained their certificate of discharge. Judgment for the defts. Held, the plt. could not proceed in this action, after this certificate was obtained, for the certificate discharges the bankrupt of all debts proved, or that might have been proved under the commission, except first, where it is unfairly obtained, and second, except where the bankrupt has concealed estate or effects to the value of \$100.

§ 2. If a bankrupt have a right of action against a sheriff for not levying an execution, this right is transferred to the assignees of the bankrupt by the assignment of his estate. The action in this case was originally commenced by the bankrupt against the sheriff for his deputy's neglect; and the assignee was admitted to come in and prosecute the action. The opinion seemed to be in this case, that the *judgment* was assigned and not an action *for a tort*. Though Thatcher J. thought an action for a *tort upon property* might be assigned under a commission of bankruptcy, but Sedgwick J. was of opinion, that a right of action for an *assault and battery* could not be so assigned.

§ 3. The plt. had a cause of action against one Burton before he became a *bankrupt*, who obtained his certificate in August 1803. Plt. sued Burton and got judgment by default, April 1804, and took out execution and delivered it to the deft., sheriff of Kennebec county, who neglected to serve or return it, till after the commencement of this present action, when he returned it unsatisfied, and further certified Burton's bankruptcy and certificate; and the plt. when he commenced

this action, knew of this bankruptcy, and on this account the deft. omitted to serve the execution.

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§ 4. Judgment for the plt. for *one cent damages*, and *a quarter of a cent costs*. It was argued, that the officer was bound to execute his precept, and that Burton should have pleaded his certificate; and that his default was a new promise, &c. On the other hand the argument was, that Burton was discharged, and that if the officer had taken him he must have been liable to his action, and the officer was not bound to serve the execution, unless by law he had a right to serve it; and of this opinion no doubt the court was. For a like reason the deft. in the execution not being liable, may excuse the officer's not serving it, except as to *nominal damages*. A creditor expressed to his debtor, one Wilkins, his dissatisfaction at the appearance of his affairs; about a fortnight after, Wilkins in contemplation of his bankruptcy, transferred to Winning certain promissory notes, as collateral security for a just debt, and the next day committed an act of bankruptcy; this failure the deft., Winning, expected. In an action of trover for these notes by Wilkins' assignee, the plt., the court held, that the transfer was fraudulent and void, as against creditors, and the policy of the bankrupt laws, and that the notes were the property of the assignee. In this case most of the English cases upon this point were cited, but see *Smith v. Hamilton & al.*, above.

A commission issued in England does not secure the bankrupt's effects here; but they are as before transferable by him, and attachable by his creditors, British or American.—*Kirby 818.*—*3 Mass. R. 325, Locke, assignee, v. Winning.*—*2 Esp. R. 611.*—*2 H. Bl. 339.*—*1 Stra. 516.*

§ 5. In this case the court held, that a colourable sale and transfer of personal property, though void as to the vendor's creditors, does not amount to an act of bankruptcy within the law of the United States, unless executed by a *fraudulent deed* or *conveyance*: and that the *concealment* of goods to prevent their being taken in execution, to be within that law, must be an *actual*, not a *constructive concealment* of them by the bankrupt himself, or by his procurement, while they continue in his intentions his own goods. In this case the bankrupt gave a bill of certain rigging &c., *without seal*, to his father, a large creditor, *who paid no money, nor gave any credit for the amount*.

*3 Mass. R. 487, Livermore, assignee, v. Bagley.* The creditor holds the property he attaches, though before judgment the debtor becomes a bankrupt and is discharged.—*1 Day's Ca. in E. 117, 123.*—*4 Mass. R. 96, 97, Selfridge v. Gill & his trustee.*

§ 6. The question was if Richardson was trustee or not. He held a negotiable note, dated October 6, 1803, signed by one Fullerton and endorsed by James Kerr, the payee, also by said Gill. November 26, 1803, Kerr being declared a bankrupt, Richardson proved this demand under the commission. In December 1803, Fullerton also being a bankrupt, Richardson got security of Gill by promissory notes assigned, and in June 1804 he collected payment, and credited Gill for the amount of the note. August 25, 1804, a dividend was declared on the estate of Kerr, the first endorser, and Rich-

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If a judgment be obtained before an insolvent's discharge, the costs, though not taxed, or the roll signed cannot be recovered of him,  
5 Johns. R. 135.

4 Mass. R. 101, Decoster v. Livermore.

4 Mass. R. 308, Foster & al. assignees of Andrews v. Lowell.

ardson received about seventy-five cents in the dollar of the debt. Thereupon the court held, Richardson became debtor to, and trustee of Gill, the second endorser, for the monies he had received of Kerr's assignee, now having obtained a legal payment of the first endorser to the use of the second endorser, and not to the use of the creditors of the bankrupt. Thus the second endorser having paid the note, it became his property, as to the maker and first endorser, and whatever the holder received of the first endorser, he received to the use of the second endorser, who was in fact entitled to have the possession of the note upon his paying the contents of it to the holder, and there was no occasion for saying, that a part of the monies received of Gill became by relation monies received to his use.

§ 7. This was *scire facias* against Livermore, who in the original suit had been summoned as trustee of Lemuel Cox. On the *scire facias* the deft. stated, that July 28, 1803, he being assignee of the estate of Edmund Bartlett jr. a bankrupt, and having in his hands monies belonging to his estate, the commissioners ordered a dividend of twenty-five cents on a dollar, whence there became due to Cox as a creditor \$469.69½, which the deft. held when examined, subject to legal disposal. Held, Livermore, the assignee, was trustee to Cox, though his notes against Bartlett, the ground of the dividend, appeared to have been negotiated to Cox's daughter before Bartlett's bankruptcy, and now demanded by her, and though Livermore was indebted to Cox as assignee, and not in his own right. The court added, that if Cox received his daughter's money, she might sue him.

§ 8. *Assumpsit for money had and received.* Lowell was assignee of Lewis and Williams, on whose estates two dividends were declared, the last September 12, 1803. Andrews was a creditor to both estates and his dividends in Lowell's hands were \$364 34. A verdict for this sum was found for the plts. assignees of Andrews, against whom a commission of bankruptcy issued January 1803, on an act of bankruptcy committed after the first order of dividend above. Before Andrews became a bankrupt, and before the said first dividend was ordered, the Salem Marine Insurance Company placed in Lowell's hands to collect its demand against Andrews. This Lowell sued, and Andrews agreed with him, that the monies which should come into his hands, as assignee of Lewis & Williams, belonging to Andrews, should be retained for said company, and agreed further to assign accordingly. Hereupon Lowell waived attaching, and no attachment was made in the suit against Andrews, though the action was entered. No assignment was executed by Andrews in writing in pursuance of his

agreement with Lowell. January 18, 1804, said Company proved their debt against Andrews, having deducted \$320 as the probable amount of the monies in Lowell's hands.

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§ 9. Judgment according to the verdict for the plts., assignees, as above; for Andrews and Lowell themselves, at the time of their agreement contemplated *an assignment, which was never made*, as the completion of their contract; no memorandum in writing; neither dividend was passed by the debt. to the credit of, or paid to the Company, though one was received by him before Andrews became a bankrupt. On the whole the agreement was loose, incomplete, and unexecuted.

§ 10. In this action it was decided, that a commission of bankruptcy, without a certificate of discharge, is no bar to an action brought to recover a demand proved under the commission, though the creditor has received a dividend. Decided in *assumpsit* on a promissory note. One insolvent in Pennsylvania may fairly convey his estate in favour of such creditors, as would accede in nine months after the deed of assignment is executed. The bankrupt is entirely divested of his property, and the same is vested in his assignees; and there is in him no residuary interest. They may, and they only can, maintain ejectment; his real estate belongs exclusively to them. 2 Day's Cases 70, Barstow v. Adams.

5 Mass. R.  
248, Lummus  
v. Fairfield.  
4 Dall. 76.—  
1 Binn. 502.

§ 11. In this case the *messenger* of the commissioners of a bankrupt, Lewis, delivered his goods to a stranger, taking his obligation to keep them safely, and to redeliver them on demand; this stranger, the plt., cannot maintain *replevin* under this delivery, against one who had taken the goods; for though "trover may be maintained by him who has the *possession*," yet "*replevin* cannot be maintained but by him who has the *property*, either general or special," but the plt. had neither under this messenger; "the general property was in the commissioners until the assignment, and then in the assignees." "The messenger, if any person, had the special property, and not the plt., who had no interest in the goods, but merely had the care of them for safe keeping." So the plt., on his *possession*, might have maintained *trespass*. It was also in this case incumbent on the plt. to prove Lewis' act of bankruptcy, and the regular issuing of the commission.

5 Mass. R.  
303, Water-  
man v. Robin-  
son.

§ 12. *This was assumpsit* on a note in writing, by which the debt. promised the plt. to deliver him thirty-seven barrels of beef on demand, and before any demand made, the debt. became a bankrupt; and it was held, that the proof of the debt before commissioners was equivalent to a demand on the promisor, and he not having obtained any certificate of discharge, remained liable in an action on the note.

6 Mass. R.  
310, Chand-  
ler v. Win-  
ship.

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 Trover by assignees against a stranger, they may, by *parol*, prove the day on which the act of bankruptcy was committed. 2 Day's Ca. 246. 2 Mass. R. 376, Jones v. Gorham, & Williams trustee.

§ 13. Parsons C. J., in giving the opinion of the court observed, that "by the *English* statutes of bankruptcy, it seems to be settled, that no debt can be proved, the amount of which must be ascertained by a jury," as they do not provide for a jury "to decide between a creditor and the assignees:" but the act of Congress does provide for such a jury, if either party require it; hence this debt could be demanded against the bankrupt's estate.

§ 14. In a *bankrupt* case, after the creditor's demand was proved, and after a dividend paid, the *assignee* endorsed on the notes that formed the demand, "*I will be accountable to bearer of this note for the benefit of the creditors of S. G.*" (creditors of the bankrupt) "*in proportion to their respective demands on him, for such dividend thereof, as may hereafter be decreed by the commissioners on the within estate, to be paid by me as assignee.*" Held, the assignee was still trustee of such creditor. The debt was due from Samuel Rogers to said Gorham on two promissory notes. Williams was sole assignee of Rogers; his first dividend was ordered December 5, 1803, and Gorham's proportion was paid by Williams, assignee; second dividend was ordered July 9, 1805, Gorham's part was \$450, which Williams had advanced to him October 18, 1804, and took his promissory note for it, payable July 6, 1805, with interest. Gorham agreed this dividend was to pay his note. Williams, January 23, 1805, signed said memorandums of said notes at the request of Gorham. January 25, 1805, Williams was summoned as trustee of Gorham; Williams had received monies, and had claims as such assignee, for a third dividend not declared; of this he was trustee, though Gorham had, February 27, 1805, by indenture, assigned over his estate to his creditors, and the case was held not to come within the 12th section of the trustee act.

Moseley's R.
28, 79, 80.

§ 15. A bond payable at a *future* day on a *contingency*, cannot be proved before the commissioners till the *contingency happens*; but if a bond on a *contingency* becomes due before all the effects are divided, the obligee shall come in as a creditor to what remains to be divided. And *joint* creditors shall first be paid out of the *joint* estate, and *separate* creditors out of the *separate* estate, but each shall come in for any surplus of either.

9 Mass. R.
337, 359,
Dawes J. v.
Boylston.
7 Mass. R.
213, Liver-
more, as-
signee & al.
9. Swasey.

§ 16. The assignees of a bankrupt in England cannot recover, in the courts in Massachusetts, a debt due to the bankrupt, in their own names.

§ 17. In a writ of entry brought to recover land, formerly a *bankrupt's*, by his assignee, held, the judgment of the district court, founded on verdict, that he had committed an act

of bankruptcy pursuant to the 52d section of the bankrupt law, was final on the question, as to all the creditors coming in under the commission or not.

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§ 18. Assumpsit was originally brought by Charles Paine, the debt's intestate, as he was assignee of W. P. Smith, a bankrupt. The intestate dying, pending the action, the debt. was admitted to defend it. Held, it did not survive against the administrator of such assignee. This was a special action for monies paid by a surety on a custom house bond; Paine had paid half, and averred he had effects of Smith's to pay the bond. The administrator pleaded the general issue, also, that Paine's estate was insolvent, and shewed how. Plt. demurred to the second plea in bar.

8 Mass. R.
621, Hall v.
Cushing
admr.

§ 19. Assumpsit; plea in bar, a discharge as a bankrupt. Held, that nothing arising under a commission of bankruptcy can protect the bankrupt but a certificate of discharge.

10 Mass. R.
23, Whitney
v. Crafts.

§ 20. *Of Pleading a discharge.* This was debt on a judgment recovered May 1803, by the plt., and one W. Jenkins, whom the plt. had survived, against the debt. The debt., Caleb Stanley, plead in bar that April 13, 1803, he became a bankrupt, (within the act of Congress &c.) that such proceedings were had before the commissioners &c.; that May 30, 1803, they gave him a certificate of discharge from all debts &c.: that a majority of his creditors, in number and value, consented the commissioners should sign and seal it; that the District Judge June 6, 1803, allowed and confirmed it, and made a *profert* of it. Plt. replied, that when said Caleb was supposed to become a bankrupt, "he was not actually using the trade of merchandise, by buying and selling, in gross or by retail, or dealing in exchange, or as a banker, factor, or underwriter, or marine insurer," "and that John Eggleston, the petitioning creditor, on whose sole petition the proceedings were had, was not a *bonâ fide* creditor of the said Caleb, to the amount of \$1000, but his pretended debt was, without consideration, and made by fraud and collusion, between him and the said Caleb, for the purposes of enabling him to obtain a certificate of discharge, in pursuance of the said statute;" and so the plt. said it was obtained unfairly, and by fraud and collusion &c. Said Caleb rejoined, that when &c., he was actually using the trade of merchandise, as a grocer; that J. E. was a *bonâ fide* creditor for a good and valuable consideration, and that said discharge was fairly obtained, and not by fraud &c. Issue joined, and verdict, "that the certificate of discharge by the said Caleb, in the plea aforesaid mentioned was obtained fairly, and not of his own fraud, and by collusion with others, as by the plt's. replication is alleged." Plt. moved for judgment, or a repleader, because said Caleb had not pleaded

10 Mass. R.
226, Jenkins
v. Stanley &
al.

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Under the Bankrupt Act of 1800, a right of action founded on a *forti*, did not pass by a general assignment of the bankrupt's estate to the assignees.—3 Day's Ca. 272, Bird v. Hempstead.

1 Bos. & P. 286, Stork v. Mawson.

6 Taun. R. 539.

4 D. & E. 166, Jackson v. Lomas.

the general issue, nor set forth in his plea all the material facts necessary to discharge him by the statute of the U. S. therein mentioned, and whether the certificate was obtained by fraud or not, was immaterial. Jackson J. delivered the opinion of the court, noticed the thirty-fourth section of the statute authorized the *general issue*; only one in this action, on a judgment, was *nul tiel record*, not triable by jury. Hence the deft. could not avail himself of the privilege of the statute. He must of course plead specially the matter relied on for his discharge, and the sufficiency of his plea must be decided by the rules of the common law. Had been clearly bad on demurrer, but cured by the subsequent pleadings and verdict. The replication was calculated to impeach the certificate, on the ground of fraud, and stated several facts to that purpose, so confessed, and avoided, &c., admitting every fact substantially stated in the bar; repeated the facts it averred, and observed, "all this could not be true, unless certain other facts also existed," and stated them, and inferred, on sound principles in pleading, the facts stated in the plea in bar, and those necessarily implied made a good defence. "The certificate is *prima facie* evidence of all the proceedings precedent to obtaining it;" and provides a verdict shall pass for the deft., unless the plt. can in his action prove that the certificate was obtained unfairly and by fraud &c. Not to be supposed the plt. meant to reply "several distinct and independent facts," so make his replication double, and which, if traversed would have been proved by the certificate. The rejoinder traversed the only material averment, viz., "the fraud in obtaining the certificate;" this is found for the deft; so the verdict decides the only material fact on these pleadings, so no replender. Judgment for the defts.

§ 21. *Composition with creditors.* Those of a bankrupt agreed, by deed, to receive 8s. in the pound, and release all over. One creditor had two distinct debts due from him, for one of which he held bills to the amount, and received his dividend of 8s. on both, and then recovered the full value of some of the bills. Held, this he recovered to the bankrupt's use. Though a *parol* acceptance of 8s. in the pound cannot be pleaded, yet when *by deed* it may; and Buller J. said, this creditor might have taken 8s. in the pound on *one debt*, and viewed the *other* as paid by the bills, but he did not take this course. A bankrupt's intention in preferring a creditor is for the jury to consider.

§ 22. One insolvent assigned over his effects for the benefit of the creditors, and it was provided in the deed, the shares of the creditors who should not execute it before a day named, should be paid by the trustee to the insolvent. An agreement

made between him and such an after creditor, after the day, that if he signed the deed he should be paid his whole debt, is fraudulent and void. CH. 18.
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§ 23. The United States cannot have an action for money had and received against a bankrupt's assignees, for the price of a ship sold by them, as his property, who had got a register by a false oath, the United States never having seised the ship for the forfeiture before his sale and transfer ; nor elected the forfeiture, and not the value. 3 Cranch 337, 356, U. States v. Grundy & al.

§ 24. The bankrupt laws of a foreign nation cannot work a legal transfer of property in the United States. 5 Cranch 290. Harrison v. Sterry.

§ 25. T. & H. Moore, partners in trade, owed a debt to Jno. & Jam. Tucker. T. Moore became a bankrupt, and Oxley, his assignee, brought *assumpsit* against J. & J. Tucker. *Non assumpsit* pleaded. Verdict for Oxley for \$143 38, subject to the opinion of the court. Before the Moores dissolved partnership they became indebted jointly to J. & J. Tucker in \$106 49 ; and after they dissolved, J. & J. Tucker became indebted to T. Moore in \$113 12, the debt his assignee sued for. Held, J. & J. Tucker might set off their debt, £106 49, against T. & H. Moore, against T. Moore's *separate* debt, \$113 12, against J. & J. Tucker. 2. Such off-set could not have been made at law, independent of our bankrupt law. 3. A debt jointly owed by the bankrupt and his partner, may be off-set against a debt owed to the bankrupt separately, and may be proved under a separate commission against him ; 4. And a full dividend received. 5. Equity alone restrains the joint creditor from receiving his full dividend, until the joint effects are exhausted. 5 Cranch 34. —J. & J. Tucker, plts. in error, v. Oxley, assignee of Tho's. Moore, a bankrupt of the firm of T. & H. Moore, Ch. 56, a. 6, s. 15.

§ 26. The deft. pleaded the endorser's bankruptcy, in bar of the action. Held, the plt. might reply the note was given to the endorser in trust for the plt. Joint debt set off against a separate claim, 5 Cranch 34. The averment a promissory note is endorsed for value received, is immaterial, and need not be proved, *Wilson v. Codman*. Many cases in which one may be a bankrupt, as a shoemaker &c., or not, see *Bac. Abr.* ; *Am. ed.*, title Bankrupt. 3 Cranch, Wilson v. Codman, 193, 210, on the law of Virginia.

§ 27. *Bankrupts, how sued &c.* Two, of three partners, became bankrupts in England ; the other resided in New York, and declared a bankrupt under the law of the United States. *Assumpsit* was brought in the name of all the partners to recover a debt due before the bankruptcy. *Quære*, ought not the assignees of the bankrupt partner here to have been joined. *Quære*, if the assignees of the bankrupt partners in England can sue here. 3. The bankruptcy of the plt. may be given in evidence under the general issue. 1 Johns. R. 118, Bird v. Pierpont.

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2 Johns. R.
342, Bird v.
Caritat.
2 Johns. R.
437, Sands v.
Codwise &
al.—4 do.
536 to 606,
same case in
error.

§ 28. But since held, a writ may be brought in New York, in the name of a foreign bankrupt, and he may be joined with the assignees of a co-partner, who is here a bankrupt according to the forms in this country settled.

§ 29. *Practice among nations as to assignees &c.* It is a general principle among them, to admit and give effect to the title of foreign assignees, in bankrupt cases. But the mode of proceeding to recover debts due to the bankrupt, whether in his own name or that of his assignees, depends on the form of proceeding in the country, and in the court, in which the suit is instituted. 3. Where a decree in chancery has been made in a suit by a bankrupt's creditors against him, his assignee, and others, and then the assignee is removed, and a new one appointed by a majority of the creditors, and the cause is brought by appeal to the court of errors, that court will not stay the proceedings until the new assignee be made a party by the respondents. Conveyances made to defeat creditors, are void by common law as well as by statute, deeds void *ab initio*.

1 Caines' R.
487, Jones v.
Emerson.

§ 30. A certificate is produced under the bankrupt act of the United States, granted in a sister state, thereon the debt will be discharged.

2 Caines' R.
25, Hendricks v. Judah.

§ 31. If a person hire a house for a year before his act of bankruptcy, and he continue in possession after such act, he is not discharged from the subsequent rent by his certificate.

1 Johns. R.
37, Hatten v. Speyer.

§ 32. A received monies prior to his act of bankruptcy, on a promise to put it out on bond and mortgage security, but neglected to do it. Held, he was not liable in a special action on the case, but that the action was barred by his certificate, as the creditor might clearly have proved his demand under the commission. Whenever the certificate would be a bar to the debt, it may be so proved.

4 Dallas 371.

1 Caines' R.
538.

§ 33. The commissioners have no power to declare the time when one becomes a bankrupt.

4 Day's Ca.
81, Barnes v. Billington.

§ 34. A debtor's attempt to conceal himself to his creditors, and being denied to them, is not an act of bankruptcy, unless thereby he actually prevents the service of process.

5 Johns. R.
412, Phoenix v. Day & al.

§ 35. One insolvent may *bona fide* give a preference to one creditor, and this, though voluntary, is valid, unless done in contemplation of bankruptcy; and if that be contemplated by the debtor, yet if on the application of a creditor he pays him, his payment is good; so is an assignment of property.

1 Johns. R.
370, Ogden &
al. v. Jackson, cited by
the court,
6 D. & E. 84.
2 East 117.—
4 D. & E.

§ 36. If C, on the eve of a bankruptcy, prefer W, a creditor, and without suit &c., and if he sue, then another; this is voluntary and void, as decided in *trover* by Ogden & al., assignees of W. & D. A. Cummings, bankrupts, against Jackson, made trustee to the *Manhattan Company &c.* Nov. 14, 1803, the

212.—Cowp. 122, 682.—3 Wils. 47—4 Burr. 2240.

Cummings being insolvent, assigned over a bill of lading of goods at sea, to Jackson in trust for said Company, to which they owed *bond fide* \$720; but if it sued them, then the property was to go to Thomas Cummings. December 14, 1803, W. & D. A. Cummings became bankrupts. Held, this assignment was void, as above, being on the eve and in contemplation of bankruptcy. Thomas Cummings was also a *bond fide* creditor, for whose use the property was held by the deft., and no evidence Thomas Cummings had urged the bankrupts for security, or that he even knew of the assignment. See 3 Johns. R. 71; 4 do. 536.

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Art. 1.

A debtor insolvent may *bond fide* give a preference to one creditor, to the exclusion of others, and it is valid, though voluntary, if not done in contemplation of bankruptcy. 2. If an act of bankruptcy be contemplated by the debtor, yet if he pays a creditor or assigns to him property, such payment or assignment is valid, as against the assignees of such debtor if made at the instance and on the application of the particular creditor. 3. Held, the answer of one deft. is no evidence against his co-deft. 4. Subsequent declarations by a party to a sale, or transfer of property, which go to divest a vested right, are not admissible evidence. 5. A deemed a witness, having been discharged as a bankrupt, and whose estate probably would not pay twenty-five per cent., in a suit brought by the assignees of B, a bankrupt, against whom A had proved a debt under the commission. Decree of the court of chancery reversed; Phoenix, the appellant, was father-in-law to Ingraham, the bankrupt; many authorities were cited.

5 Johns. R.
412, 430,
Phoenix v.
Day & al. at-
signees.

CHAPTER XIX.

ASSUMPSIT. BARON AND FEME.

ART. 1. *General principles.* § 1. There is no part of the law in Massachusetts, and in the United States generally, that deserves more attention than this in relation to husband and wife. It is the ground of actions, and especially of *assumpsit*, in a vast many cases. The connexion between *baron & feme* involves relative rights, duties, and obligation, that are very numerous.

On no subject, perhaps, in England, has the law been more changed in three centuries than on this. The old maxim,

CH. 19. once so general and unyielding, that the wife's existence
 Art. 1. was incorporated in that of her husband's, or suspended during the coverture; that she had no will of her own, no volition, no self control, and no power to act but as his servant or agent, seems now almost done away; as now she has numerous rights of property, and is under numerous obligations in relation to it; some of which are now enforced in courts of law, and many more of them in courts of chancery. Some peculiar difficulties attend this part of the law in Massachusetts. Here our statutes make many material provisions which are new, and not found in the English law. On these provisions there have been, as yet, but few decisions. Though we have adopted some of the rights and obligations, especially where there is a *separation*, which are enforced only in chancery, where there is a chancery court, yet we have no chancery court to enforce such as we have adopted. Hence it is a subject of much uncertainty how in this state they are to be carried into effect; and for this reason too, it is very often a question which of these rights and obligations, found in English books, we have, or have not, adopted.

This case of *baron & feme* is the only case in the law, in which the law wholly, without the creditor's consent, discharges his debtor, the *feme*, and substitutes another debtor, the husband. As where, when *sole*, she has contracted to pay rent for an estate she has hired, he alone by law becomes liable to pay it, and has in return the *usufruct* of it as absolutely his own, and she by her marriage, is totally discharged of her contract to pay. What marriages are legal, see Ch. 46, Marriages.

2 Bl. Com.
 433, 439.—
 2 Bl. Com.
 443, 444.—
 Co. L. 112.
 Gibb. 52.—
 10 Mod. 206.
 —New on
 Con. 21, 30.
 2 Vern. 64,
 67, 217.

§ 2. The maxim, they are one person in law, according to Blackstone, and other eminent law writers in England; the English law considers marriage as a civil contract binding, when the parties are able and do contract in legal form. This principle we have adopted, the effect of which according to the common law to make them one person, so incapable of contracting with each other in any case. This is the old maxim the courts of law adopted as a general one, but which has been almost done away in time and practice; for numerous are the cases in which *baron & feme* are viewed in courts of law, as well as of equity, as two distinct persons. As where the law holds a deed, or devise of land to her, vests it in her, and not in him, the freehold or inheritance is absolutely hers, and the *usufruct*, and that only, is absolutely his. And hence as to real estate they are clearly two distinct persons in law.

So in *equity*, and in the *civil* and *French* laws, they are

generally distinct persons, and may contract with each other in many cases, and especially with the formality of a trustee.

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If they agree to live separate, this contract between them is recognised in law as well as in equity, and he never can resume the marital rights, he thereby has renounced. Each covenant is valid in law and equity, they make on the occasion, and "binds them both, till they both agree to co-habit again." And Mead's case, 1 Burr. 542, to the same effect.

Vern. 386,
Lister's case,
8 Mod. 23.

In equity she may sue him by her *prochein ami*, and in our court in an action of necessity, in certain cases, as for her alimony allowed her to be paid by him, when divorced from bed and board, as a. 12, this chapter, when in fact they continue to be husband and wife. So in cases of crimes, they are two distinct persons.

Str. 478.

She is as capable of property as a feme sole; and if he renounces his marital rights to the usufruct of her real property, she alone can convey it by copyhold-surrender, in the nature of a deed or devise, and after so renouncing he need not be joined in the conveyance, and it is good in law.

7 East 539.—
1 H. Bl. 334
to 351,
Compton v.
Collinson.

So if the husband covenant to pay trustees a certain sum annually, as separate maintenance for his wife, with the consent of them, or of their executors &c., the contract will be enforced in a court of law, though providing for a future separation. In this case many were cited to the same purpose. 1 Burr. 542.

2 East 283,
Rodney & al.
v. Chambers,
but 2 Ves. jr.
526.—2 Vent.
217.—Co. L.
112.

She is a distinct person when she executes a mere power, and by it conveys lands; and by such power she may convey even to her husband. So she may act in *auter droit*, without him, and convey to him as executrix of her deceased and former husband, his lands, as in these the second husband has no interest. If as trustee she has lands, she can convey them without him. So lands vested in her, to convey on condition, she can alone convey, as her husband can receive no injury from her act. 6 East 257. So she may have stock in trade exempt from his debts.

Reeve's Dom.
Rel. 120, 121.
—W. Jones
137.—3 D. &
E. 618, Jar-
man v.
Woollston &
Haselton v.
Gill.

But some cases are now decided on this maxim, as where a grant is made to A, and to B and his wife, B and his wife take a moiety only, as one person, and that an *entire* estate. So he cannot grant any thing to her, or contract with her directly; and generally all contracts made between them before marriage are avoided by it.

10 Mod. 205.
—Co. L. 112
—F. N. B. 63.

And if a feme obligee marry one of the obligors, it is a discharge to them all; but a wife may take by her husband's will or be his attorney. There are in the English and our law books scores of such cases relating to this maxim, shewing it is true in some cases, and that it has no foundation in many. A number of these cases will be found in other parts of

Cro. El. 551,
Dennis v.
Paine.

7 East 539.

CH. 14. this work. Per Lord Kenyon she can do no act to estop her-
Art. 1. self.

3 Salk. 66,
Thompson v.
Woods.—
2 P. W. 243.
—Salk. 327.

§ 3. *His contract to leave her property at his decease is valid.* Whatever was the opinion once, there is now no doubt on this point in England, or the United States. As where the husband gave a bond conditioned to leave his wife £80 at his death, if she survived him, and to her use; on his death an action was brought on this bond against his administrator, and judgment for the plt. Nor can he release any right, that can by no possibility accrue to her during the coverture.

6 D. & E. 381,
Milburn v.
Ewart & al.
extra.—
1 Vern. 408.
—2 Vent. 343.

So where January 1782, *John Milburn*, the plt's. husband, gave a bond to her whom he intended to marry, conditioned for the payment of £3000 to her by his heirs or executors, her executors &c., at the end of one year after his death, if she survived him. Held, this bond was valid and not released by the marriage. And when it was pleaded in bar of the action, the plt. might reply the special purposes for which the bond was made, for they are consistent with the bond and condition, and the case is the same if the man make a promise instead of giving a bond.

12 Mod. 288
to 296, *Cage*
v. *Acton*.—
Same case,
Salk. 327.

In this case, *Cage v. Acton*, the same point as in *Milburn & al.* was decided by a majority of the judges; and all the cases on the subject were considered, and held the contract was valid, and only suspended during the coverture. It was urged, if a husband owes a thing to his wife, he owes it to himself, and it was asked, how that could be? To which it was answered, that "the law very often made a *fiction* for the preservation of right, and a suspension of a personal duty is not always an extinguishment of it."

2 Mass. R.
159, Page 7.
Trufant.

§ 4. *Separate maintenance.* This principle also has been established in Massachusetts; as where, February 8, 1794, *Colson Trufant* as principal, and *Joseph Trufant* as surety, gave a bond to *Page*, father of the principal's wife, conditioned for her maintenance after a voluntary separation; and held good on argument. And that a husband and wife may well separate to avoid the effects of jealousies and animosities between them, and that a contract for her separate maintenance was valid. It was objected, as the wife was not bound by her covenants in the articles of separation, and the trustee had made none, there was no consideration for the bond; but *Parsons C. J.* said, a bond imports a consideration, "the want of which the obligor is estopped to plead," though he may avoid it by shewing it was obtained by fraud or duress, or that the consideration is illegal, or against the policy of the law. "The consideration was legal and meritorious, as it was made to secure a separate maintenance for the wife, who separated from the husband for their mutual comfort. This has long

been the practice in England and the United States generally, and in numerous cases. See cases of *Lister* ; *Crompton v. Collinson* ; *Rodney v. Chambers*, above. CH. 19.
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§ 5. *The general principle on which the wife is sued alone.* That she may be sued alone in certain cases, is perfectly clear, but eminent judges and lawyers differ as to the principle. For centuries past it has been settled, that she might be sued alone on her contracts, or for her torts, where her husband was banished ; so where he was an *alien enemy*. So where he was *transported*, though only for seven years ; so in modern cases where there is a regular separation by contract, or a judicial divorce from bed and board. On what principle do these cases rest ? Those most opposed, as Lord Kenyon &c. to the wife's liability to civil actions, contend she is liable only on the principle her husband is *civiliter mortuus*, or *civilly dead*, as where banished, transported &c. ; but this principle clearly fails, for most clearly the *alien enemy* husband is not *civiliter mortuus*, nor can one be, transported but for seven years, nor in these or even in the case of one banished for life, or exiled is he in fact *civilly dead* ; for his wife cannot marry again, no administration can be granted on his estate, there is no descent of his estate, no dower assigned in it. So are clearly the best authorities. Lord Mansfield and others have rested this liability on cases of separation, and the agreement to live separate, and on her separate maintenance ; but the true principle seems to have been not much noticed in the English cases. The true principle is this, barely mentioned by Lawrence J., when he holds she is not liable to be sued alone, because her husband *had not renounced his marital rights* to her person, society, and services &c. ; and by Lord Kenyon when he said, if we allow the wife to be sued alone (in cases of separation) she may be taken in execution and imprisoned alone, *and this will be as a divorce*.

The true principle is here suggested ; for on examining the cases carefully it will be found, she cannot be sued, though living separate, where her husband has not renounced his right to her person. And that she may be sued alone where he has renounced this right, and she may bind herself so as to be sued alone on her contracts, whenever his marital rights are not affected by them and there is no coercion. This is the case of the wife of the *alien enemy* ; and because no rights of her husband can thereby be affected, he being an alien enemy and out of the country, has no right that can be lost or effected by her being sued alone and imprisoned. And it has been well observed, that in the case of *Marshall v. Rutton*, on which so much stress is laid by some, *this right was not renounced*. It has been said by Judge Reeve, that she is not

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criminal law absolutely adjudges she wittingly and willingly receives him to her bed, and is as guilty as he is ; and hence, this criminal law invariably and justly punishes her for wickedly and wilfully committing the crime of adultery. The English lawyers in some cases, in order to preserve one absurd fiction, seem to have laboured hard to invent another. Holding to the one, a wife could not convey her real property for want of existence and will, and finding she had always done it by fine or recovery in court, they invented another notion, not having the least foundation in fact, that is, that she in so doing was considered by the court, as a *feme sole*, when the very record itself of the case shewed she was examined by the court as a wife, and in every breath inquired of, if she was influenced by her husband. In fact, such is the inveterate hold this fiction or notion has ever had on some minds, that they never can view a wife as having any will, any power to contract for herself, so as to be suable alone. Perhaps this notion was once correct, when the law viewed wives almost as their husbands' slaves, and almost incapable of separate property ; however this may be, it has in the present state of society in England and the United States, no foundation in fact. Half of the rights of wives now may be claimed in chancery, and near all their rights, when living separate, as by law they may do, may there be claimed and enforced, where they are viewed to most purposes as single women, and may even by *prochein ami* sue their husbands ; and if they have no other trustees of their separate property, have their husbands deemed and held trustees. And even at law, they can, as all agree, take securities for property to any reasonable amount before marriage, keep them during it, and enforce them whenever it is terminated ; they can in courts of law, directly and by themselves alone, sue their husbands for alimony, as will appear in many cases stated in this and other chapters ; and many other rights wives now have in England and America, which render them almost as independent, as to property and suits, as wives are in France and other countries, that have adopted the Civil Law, as the broad foundation of all their laws.

§ 7. *Morality, religion, and public policy.* It will be recollected, that as riches of all kinds, and especially personal property, rapidly increased in England in the eighteenth century ; so separation of man and wife, with separate maintenances and renunciations of marriage rights, rapidly increased also ; but they did not excite any material alarm for a long time ; in fact, not till after many judicial decisions, to be cited in the sequel, had been made establishing their legality. However, in process of time, as new notions widely spread in Europe, by some thought liberal, and by some loose and pernicious, the

final effects of which were seen in the approach and progress of the French revolution, some judges and lawyers more rigid in their morals and religion, and of course more so as to family order and public policy, became more opposed to these separations, and their natural consequences, the breaking up of many families, and so family order. They found, however, their legality was established by numerous precedents that could not be overturned ; but these judges and lawyers were not so bound but that they might express opinions, that it had been better if originally the decisions had been the other way, and against their legality. These opinions they occasionally did express. It became natural for them to seize every allowable pretence to discountenance them, and as often, in making them, the marital rights were not clearly, fully, and permanently renounced, and the rights of separate property were not fully and permanently restored the wife, so as to restore her condition of a *feme sole* in all things but marrying again, whence the reasons of her liability to be sued alone, in some points failed ; it was natural for judges &c., on principle opposed to such separations vastly multiplied, to seize on these defects in the articles of separation, to discountenance these modern inroads on the marriage state ; and one way was as in *Marshall v. Rutton*, to hold the wife separated not capable to contract, so as to be alone suable, as this at once placed her in a humble subjected state in which no one would trust her ; a state in which her friends would not be much inclined to place her. It must be admitted, that this wife ought not to be suable as a *feme sole*, until she is restored to the condition of one in relation to her husband, that is, until she has the rights of a *feme sole* as to her separate property, and rendered no longer liable to have her person, society, or personal services ever after claimed by her husband. Now, upon a close examination it will be found, that in *Rutton's* case, and in every case in which the decision has been against this separate liability of the wife, there have existed one or both of these defects in the articles of separation. Either her separate maintenance has been clearly inadequate, and a mere fraud upon her, or not effectually, or not permanently secured to her, or her husband has retained some right at some time to seize her person, or to claim it with her society, and of course her services. In either case the reason of this her liability fails. It is true, though such defects have been so discoverable in these cases, they have not always been expressly mentioned by the judges in giving their opinions. On the whole, it is very clear the cases of *Barwell v. Brooks*, *Ringstead v. Lady Lanesborough*, *Corbitt v. Pilnorts*, &c. remain unshaken, if we examine the cases

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Cm. 19. themselves, and do not hastily rely on the reasoning in them:

Art. 1. Her power as to a will, Ch. 195, a. 3, s. 30.

7 Johns. R.
81, 87, Jack-
son v. Hollo-
way.

§ 8. *Her deed valid or void.* Her capacity to hold and to convey property has been already stated; her deed with her husband releasing her dower is valid in this state, so her lease with him of her land in New York is valid &c. As where the wife was seised of lands, and her husband in her right, in 1796 leased them by deed to B for life. This was assigned to C. In 1806, they made a lease to D of the same lands, for the same lives with the same covenants; the husband died 1808, and the wife in 1809 received rent of C. Held, she was bound by her deed of 1806, duly acknowledged and recorded, according to the statute; so had no power to affirm his lease of 1796, but if she had not been a party to the deed of her land, her husband's lease as to her was void; then her acceptance of rent after his death will not confirm his lease. She by the deed of 1806 conveyed her interest, and had no power to confirm the deed of 1796.

§ 9. The husband is accountable for the rents and profits of his wife's real estate, received by him, secured to her separate use; and if he buy land with her money, and take the deed in his name, he holds them in trust for her; and if A purchase them of him, with notice of the trust, A is trustee to her, but he is to be allowed for his beneficial and permanent improvements on the estate. Johns. Ch. R. 450, *Methodist Episcopal Church v. Jaques & al.* But the husband is bound to maintain his wife during the coverture, though she has separate estate, and during the marriage agree it shall be applied to her maintenance, as such agreement is void; but he is to be allowed for necessary repairs on her estate, and for his monies applied to her use, at her request, not for the ordinary maintenance of her or her family. *Id.*—was in chancery. 1 P. W. 608, *Bennett v. Mayhew*; 1 Bro. C. C. 232; 2 do. 287.

Nothing but the death of husband or wife, or a decree of a competent court, can dissolve their marriage. 1 Johns. Ch. R. 389.

Husband and wife agreed by parol, that he should buy a lot in her name and build a house on it, and be re-paid out of her other lot and house, to be sold for this and other purposes; he bought and built accordingly; she died, and both descended to her minor heirs. Chancery ordered her old lot and house sold, and him to be reimbursed &c. 1 Johns. Ch. R. 537, *Livingston v. Livingston.* And she may answer alone in chancery, as to her separate estate, and then she must have personal notice. 2 Johns. Ch. R. 189. And she may be joined with him in an action on a note made to her during cover-

ture. 2 Maule & Sel. R. 393, 397. The note imports a consideration. And Lord Ellenborough said, if a bond be given to the wife and she dies, the husband shall not have it without taking administration, as it is merely in action, cited Cro. El. 61; 2 W. Bl. 12, 136; 1 H. Bl. 114; Cro. J. 644; 2 Wils. 414, 424; Cro. J. 77, 105; 3 Lev. 303; Co. L. 120; Sel. N. P. 263; 2 Mod. 217; Salk. 114; 4 Mod. 156.

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And they may join in an action of account for rents and profits of her land, arising during the marriage, 1 Day's Ca. in E. 263, 265. And the action may be in the county in which the plts. live, though the land be in another county, though objected the title was in question, and that the action should have been brought by him alone; as to the locality, answered the statute only applied to suits in which the title is definitively settled, and as to the joining, cited *Oleberry v. Walby & al.*, cited Ch. 120, a. 2. s. 28.

Lewis v. Martin, in error.

An agreement made by *baron and feme* during marriage is void, and cannot be enforced in chancery against the baron's executor. 1 Day's Ca. in E. 221, 238, was a suit in chancery for monies the husband sold her lands for, and promised to pay her. The decisions of the county and Superior Courts were the other way. Court of Errors denied, that the English chancery system, as to husband and wife, and her separate estate had been adopted in Connecticut, and said it had been adopted in England since our ancestors emigrated.

Dibble v. Hutton.

ART. 2. *His rights to her property, and power over her person; torts as to her &c.* The personal property of the wife in possession, which accrued to her before marriage, is unquestionably by it absolutely transferred to and vested in the husband, as well her chattels as her goods, and as fully as she had them; but if he survive her, he is not entitled to things she has in *auter droit*.

2 Bl. Com. 433.

Loft 83.

In her estate of freehold or of inheritance, he by the marriage gains only the *usufruct*, or a title to the rents and profits, so that, however, they become absolutely his during the coverture, and after that terminates, this real estate goes to her or her heirs, or rather the estate itself always remains in her, as she remains seized, though he by reason of his *usufruct*, by possibility for life, becomes seized with her, except, however, in some cases he may be tenant by the courtesy, as fully stated chapter 130, art. 3. "But in her chattels, the sole and absolute property vests in the husband to be disposed of as he pleases, if he chooses to take possession of them; for unless he reduces them into possession by fixing some act of ownership over them, no property vests in him, but they shall remain to the wife or her representative after the coverture is determined." A lease assigned to her is well, if he do not disagree.

1 P. W. 468.
—3 P. W.
409.—Co. L.
351.—2 Bl.
Com.
Doug. 452.

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10 Mod. 160,
166, Miles v.
Williams, see
243, 248.

§ 2. He may release a debt due to her *dum sola*, and if he and his wife obtain judgment during the coverture it is his, and they may join, which proves a debt still due to her, and that *choses in action* may remain in jointure after marriage, though chattels personal cannot; the nature of the contract to her is not altered by the marriage, but only the power of the wife suspended; so neither is the nature of the contract altered by bringing the action. But, indeed, after judgment *transit in rem judicatam*, some hold, this gives it to him, and if he dies before it is collected it goes to his executors, others to the wife. That the husband may collect such judgment to his own use, there is no question, but if he do not, and die, and his wife survive, is it not hers as a chose not reduced into his possession, and must not she as surviving plt. enforce it? And if the judgment changes the contract, is it not in favour of the joint plts.?

10 Mod. 63,
De Aith. v.
Baux.—
6 Johns. R.
112.—5 Ves.
jr. 616.

§ 3. *A distributive share* in an estate intestate is a *chose in action*, and the wife has it by survivorship; but her husband can release it, or recover it to his use. So a legacy given to her during coverture survives to her, not reduced to his possession.

Co. L. 46,
300, 351.—
1 Roll. 343.

§ 4. *Her leases for years.* These vest in her husband *sub modo*; he is entitled to the rents and profits, and has power during the coverture to dispose of the term, as he pleases, but if he do not dispose of it during the marriage, the survivor has it. If he make a lease of part of the term, his executor shall have the rent reserved on this part, and the wife shall have the residue of the term. If he grants the whole term on condition, and dies, and his executors enter for condition broken, they shall have the term; *because the baron having disposed of the whole, his wife had no right left in her*; the condition reserved went to his representatives.

1 Vent. 259.
—Co. L. 46,
351.—Hob.
3.—3 Salk.
64.—3 Bl.
Com. 498.—
Bac. 378.

The wife's term for years may also be taken in execution for her husband's debts, as may also the income or *usufruct* of her estate of freehold or inheritance; but he cannot by his will dispose of her term, she surviving; nor does he have a term held *to her use*, or a mere *possibility*, when he survives her, as if a *feme sole* have a term for years, and is dispossessed of it, marries and dies before he gets possession of it, he is not entitled to it, but it goes to her administrator as her choses do. So if A marries B, and she has a term for years, but had disposed of it to C for a term, if he lives so long, she has a possibility that C may die before the term ends, and if he do, A and B being both dead, this term will not go to the baron's executor, but to the wife's administrator.

Co. L. 46,
300, 351.—
1 Roll. 343,
316.

Co. L. 35.—
1 Roll. Abr.
346.

Cro El. 466.

He has only the usufruct of her term in trust. As where a term was granted to a trustee for the use of a *feme sole*, and she married and died. Held, her husband was not entitled

to the *use*, but it was her administrator's; also, that her husband, during the coverture, could not grant the use, or incur her the term; his only benefit was the income during the marriage. But there are cases decided on a different ground, as where a *feme sole* leased her lands to trustees for herself, married, and received the rents; held, her husband did not hold this estate as *her administrator* (the avails of the rents she received,) as he did her other *choses* in action, but that he held such term, and the said avails, as *husband*, and need not inventory them; but quære if there was any estate coming to him but said avails, and they were his, as being personal effects actually received by his wife. There is a difference in regard to terms settled to the separate use, or as her jointure, or for her maintenance after his death, he evidently has no power over these, but only to receive the *usufruct* during the marriage, while he maintains her.

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Vern. 7, 18.

Hob. 3.

2 Ch. Ca. 86.
—Bulst. 118.

If a woman have a term for years and marry an alien, he has no right to dispose of it. 10 Mod. 104.

Survivorship in chattels real, on the principles of the *common law*. If the wife have them, or a term for years, her husband may clearly dispose of them, and they are liable for his debts, but if he die and she survives, they go to her as her *choses* do; if she die before him, they go to him, not as a *surviving joint tenant*, for they cannot be joint tenants as their interests commence at *different times*, and by the *acts of the parties* are not acquired; but on the old common law we have adopted, they are his absolutely, and he is not to account for them, nor to pay her debts out of them, but he must out of her *choses* in action, he collects as her administrator.

1 Roll. 345.
—1 Vern. 270.

If the husband mortgage the wife's term, the equity of redemption belongs to him, and his power over his wife's term for years is so complete, that he may dispose of it by lease, to commence after his death, *bonâ fide*, and for a valuable consideration, though he cannot devise it. A term for years, but not a freehold, may be conveyed, to commence *in futuro* by the English law. He cannot devise her *reversion* in a slave on an estate for life if she survive him, though he can sell it.

Hob. 8.

Upham v. Upham & al.
2 Hen. & M. 381, 394.

§ 5. *Her rent; his right to it, &c.* When a woman leases her land for rent, and marries, her husband is entitled to it, as it comes in lieu of the usufruct; and rent accrued during the coverture in arrear at his death, goes to his executor.

§ 6. So if the feme lessor marries, her husband is entitled to her rents; and rent in arrear accrued to her before marriage, like other *choses* in action, if not collected by her husband during the coverture, will survive to her, or if she dies first, will go to her representative by the common law, but by a statute of Hen. VIII. it is the husband's. If a condi- Co. L. 146.

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tion be annexed to her estate, as on the non-payment of rent, her grantor may enter; she, though covert, must have the condition performed, in order to preserve the estate of herself and her husband. If she be lessee, and engaged to pay rent, on her marriage she is discharged by law, and her husband is liable for it during the marriage.

Co. L. 351.

§ 7. *Her emblements, his rights to them.* Where her estate is for her life, and she dies, while the crop is growing, the emblements are his; and if he dies first, his executors have them as personal property, and they may enter to take them. So if her land descend to her heir, and her husband survives, and is not tenant by the courtesy, he may enter to take them, on the general principle that he who sows must reap. And as to emblements on her land, the principles govern that govern in other cases. See Emblements, C. 76, a. 6, at large.

Co. L. 299.

§ 8. *The effect of a lease for life to them, where she has a previous life estate.* She was tenant of the freehold, and the lessor leased to her and her husband for their lives. Held, they were not joint tenants, for her title accrued *first*, and this new lease to both worked no surrender of her prior life estate, but that the husband had her prior estate, in her right, during the coverture, and if he survived her, he had an estate for his life, under the new lease. If an injury be done to her estate itself, freehold or inheritance, as by destroying buildings or fences, or cutting down trees, digging up the soil, &c., she must be joined in the action, and the trespass may survive to her. If to the usufruct &c. he may sue alone.

Co. L. 351.

Palm. 313,

§ 9. *His right to her property accruing to her during coverture.* By the English law, it seems in English law courts, it is held he has an absolute right to it, and may alone sue for it, as for a legacy bequeathed to her *during coverture*. But it seems also, the English *chancery* court holds a very different doctrine, that is, if she survives him, she has it, if not reduced into possession by him during the marriage. And as in every such case in England, resort may be had to chancery, she has it in every case if she pleases, and survives him, when not collected by him. Now which of these rules prevails in this country? I think the *chancery* rule as to property bequeathed, or descending to her during the coverture, and distributive shares; as to her earnings by her personal services, they are unquestionably his. Her time and service are his, and in return he is bound to maintain her according to his rank and condition in life. But property bequeathed or given to her *separate use* is her's, and all real estate of freehold or inheritance coming to her during coverture is hers absolutely, except the usufruct of it during the marriage; these are hers in the same manner, whether coming to her before or during

marriage, by gift or descent. And so I think are a legacy and a distributory share hers in the same manner, whether they come to her before or during the marriage. Certain it is they must first vest in her, though coming to her during the marriage; the distributory share is and must be assigned to *her*; the statute assigns it to her, not to her husband, and in finding to whom it belongs, her degree of kindred is computed, not his, and the legacy is bequeathed to *her* and not to *him*; she is the meritorious cause, and her husband derives it when he collects it from her, and not from the intestate or testator. Now as this legacy or share, coming to her during the marriage, vests in her, in the first instance, as one does coming to her before marriage, and the last remains hers till he collects it, and so shews his intention to take it from her, and make it his own; so on every sound principle, the first remains in her till so collected. This is according to the intent of the law and of the giver. In giving her the legacy he means her benefit clearly, and not her husband's; for if meant for his benefit it would have been given to him directly, and not to her. And when the law gives my wife a share in her father's estate, it surely means her benefit and not mine. I may wish not to take it from her, but if the law absolutely makes it mine, even against my will, as some contend, I never can let her have the benefit of it, if she shall survive me, by omitting to collect it; for if absolutely mine it will go to my executor or administrator, though I omit to collect it, though she survives and I intend she shall have it. It is agreed even in England, that if the wife be beaten or defamed, the damages to be recovered for the wrong belong to her, and survive to her if not collected during the marriage. And it is a very reasonable rule of law, that the husband wishing it may leave to his wife a legacy or distributory share, coming to her during the coverture by gift or descent, without lessening in the least degree the husband's estate or his ability to pay his debts. And in this case he alone is entitled to an action *per quod* &c. to recover damages for the loss of her society and services. And so damages for carrying or enticing her away from him; and so for criminal connections with her, except when they live apart by proper articles of separation, or except where he permits it.

§ 10. *His power over her person.* The better opinion now is, that the husband has no power to correct his wife as he may his servant or child, though anciently the opinion was different, and the practice in many cases is continued. No law is recollected that recognises this power. If now a husband strike his wife in anger, and not in self-defence, or to restrain her when she is insane, it is, according to the better opinion, an act of cruelty and cause of separation *a mensa et*

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3 Burr. 1622.
—4 Burr.
1991.—
Haw. 136.—
2 Lev. 128.—
8 Mod. 22,
and Stra. 478,
Rex v. Lister.
—1 Burr. 542,
Mead's case.

CH. 19. *thoro*, or for binding him to his good behaviour. The husband
 Art. 2. may use force enough to restrain his wife when insane, and so



Str. 1207,
 Sim's case.

There is however one difference; if she elope and go away from him without cause, he may legally seize her person and bring her home, using no more force than is necessary to cause her to return to his house; but he cannot do this after they have agreed to live separate. But the wife has no such power in regard to her husband. He may swear the peace against her, as well as she against him.

4 Barr. 1991.

In *Rex v. Lister* the court held, that where a wife abuses her liberty, by squandering away her husband's estate, or going into bad company, he, to preserve his honour and estate, may lay her under restraint; but where nothing of this kind appears, he cannot justify depriving her of her liberty.

The court will not deliver a wife to her husband who has used her ill. Not separated for his hard usage, but he is bound to his good behaviour. 3 Salk, 189.

Cro. Car.
 370.—Lev.
 122.—Reeve's
 D. R. 72, 79.

§ 11. *Her torts, and injuries to her.* He alone is answerable for his wife's torts, committed by his orders, or in his company, and they die with him; these are *his* torts, and not *hers*. She is excused on the ground of his presumed coercion. But if the tort be committed by her alone, not in his company, or by his request or command, expressed or implied, both are liable to be sued: it is her tort, and if she survive she may be sued alone for it. If a *feme covert* take up goods, affirming she is a *feme sole*, and they come to her husband's use, he is liable on his implied promise, but if they come not to his use, he is liable for her fraud, as for any other tort committed by her, to which he was not privy; both must be sued. So if she cheat one out of his property, her husband is liable; for her offence which is only finable, both are liable; but when punished corporally, she only is liable to punishment, when not committed in his company, or by his command. If she be liable to a statute penalty, both must be sued, or informed against. She is not punishable for crimes she commits with him, or in his company, or by his coercion, if only *mala prohibita*, or against property, though even burglary. So if he only approves of her act or encourages it. But his presence or command does not excuse her in *treason*, or in keeping a *brothel*, nor as to offences purely *mala in se*, as murder &c., and generally he may shew her act was done against his will. See Civil Subjection, Ch. 197, a. 6.

As to *torts* committed against her, as assaults and batteries on her person, defrauding and cheating her, they are injuries to her, as before observed, but he may make the damages, occasioned by them, his own when he pleases, by bringing his

action for them in his and her name, recovering damages, and these, when collected, will be his; as well as those he may recover in his own action for his loss of her society and services; and this is all reasonable, as he must pay damages for the torts and wrongs committed by her, as well as for her cheating and frauds. But if he do not recover the damages thus accruing to her, for the wrongs thus done to her, they are hers, and may survive, and she may sue alone for them if she survive him, and he has not collected them, and if she die first they die with her.

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Where they ought to joint, or not, in actions, and on what principles, see American Precedents, and Declarations post, Ch. 175, a. 2. These are the principal grounds of his rights to her property, real and personal, in possession and in action, in debt and damages. As to his power over her annuity during marriage, see Annuity Ch. 140, a. 17. But it has been held in New York, he is entitled to all her choses in action, if he survive her, reduced into his possession in her life time or not; because it seems the right to administer her estate vests in him on the statute, to recover her personal estate to his own use; this is English and Massachusetts law. See *Nurse v. Ray*, Ch. 19, a. 3, s. 5.

6 Johns. R.
112, 120.

§ 12. *His rights in her mortgages.* The wife joins with her husband in mortgaging her estate of inheritance, (in the United States by deed, in England by fine,) and the money is not paid at the day, and he takes up more money on her estate thus mortgaged, it is held, in England, for his after loan, for the legal estate is in the mortgagee by the forfeiture, and equity will not take land from the mortgagee till the last sum borrowed is paid, as well as the first, as he has the legal title, and equal equity with the wife. This may be law and equity in those States which have adopted English principles, in cases of mortgages; and by our law in Massachusetts, she may mortgage her estate &c., for her husband's debts, but it is bound no further than the deed extends. Indeed here if the husband borrow \$1000 of A, and give a mortgage to A, as security, and then borrow another \$1000 of A, merely on his note, the mortgage holds but for the first \$1000. See *Mortgages Ch. 112*, the reasons.

If a mortgage of lands be made to a *feme in fee, dum sola*, or married, to secure a debt due to her, it is her husband's during the coverture, as the debt is; if during it, he collects the debt, it is his, and the mortgaged land is discharged; but if he do not so collect it, and dies, it survives to her; or if she dies first, it goes with the debt to her administrator; but if the mortgage title becomes absolute, it must follow the deed to her, and vest absolutely in her, and her heirs; and if during the marriage her husband has the *usufruct* of her estate in fee, and if he

CH. 19. survive he may be tenant by the courtesy &c. ; but if the title
 Art. 2. becomes absolute, *after* the coverture is at an end, he has no
 interest in this absolute estate in fee.

If the husband takes a mortgage of land to himself and wife, it is a joint interest, and if she survives she has it, by the *jus accrescendi*, where joint tenancy exists, and where not, she has it as a gift from him, as he sees fit to vest a legal title in her, by taking the deed or conveyance to both ; his lending the money alters not the case. However her right must yield to the just claims of his creditors, where the debt is truly his.

A mortgage, though in fee, being mere personal estate, and a chose in action, if the wife's, may be disposed of by her husband, and reduced to his possession, and made his, as other personal estate of hers is ; but his alienation of it will not bind her, for this is not reducing it to his possession ; nor is it so reduced till paid to him, his attorney, or agent ; but if his creditors get possession, and alienate it to pay his debts, this is such a reducing it into possession.

§ 13. *Her rights and powers in equity ; select cases added.*
 In equity a *feme covert* having separate property, can dispose of it ; hence if she agrees, and shews her intention by her agreement, to affect her separate estate, a court of equity will apply it to satisfy such agreement, in the same manner as if she had been a *feme sole* ; nor is it necessary to enable her to change her separate estate by her agreement, that a power of appointment should have been reserved to her ; for if she takes an absolute, unqualified interest in her separate property, the power of appointing it as she pleases, is incidental to such property ; therefore in this case, held, her will giving her separate property and its produce, whether derived from her husband or a third person, was a good and valid will. As to her separate property equity views her as a *feme sole* ; but when in trust, this may be so worded as to restrain her power.

§ 14. *Her will how valid.* In the above case *Fettiplace v. Gorges*, 1 Ves. jr. 46, 49, the wife had a large separate personal property in trustees' hands, in common form, and after her death a writing was found, signed by her, in these words, " I leave all my personal estate, and every thing belonging to me, to my niece Diana Gorges." Held, a good will. On the husband's bill filed against the niece for the property to be decreed to him ; because as argued for him, " there is nothing authorising his wife to make a will," and that it had never yet been decided, that it is incidental to separate property to dispose of it by will ; the Chancellor observed that it had in *Peacock v. Monk* ; also, that " if no disposition, the husband succeeds as next of kin, not in consequence of the marital rights." Bill dismissed. Cases cited ; for the

New, on
 Con. 23 &c.,
 116 &c.—
 3 Bro. C. C.
 340, *Pybus*
v. Smith.—
 1 Ves. J. 46,
Fettiplace v.
Gorges.—
 3 Bro. C. C.
 8.—9 Ves.
 220.

2 Ves. 190.—
 4 Ves. 129,
 692.—13 Ves.
 437.—9 Ves.
 524.—2 Atk.
 60, 379.

husband, *Hearle v. Greenbank*, 1 Ves. 299, (517;) for the niece, *Wright v. Lord Cadogan*, *Peacock v. Monk*; and her counsel said, in *Hearle v. Greenbank*, there is an express power as to the *real*, but as to the *personal* Lord Hardwicke says, "it is given to her separate use, in which case it is the rule of the court that a *feme covert* may dispose of it." See *Norton v. Turvill*, a. 10, s. 7; *Bell v. Hyde*, a. 10, s. 4, *Hulme v. Tenant*, 7.

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§ 15. But the court will not subject to her contract her separate estate, unless it appears she meant to charge it. It is doubtful if equity will execute a contract made by *baron & feme* to live separate and for separate maintenance, if there be no trustee, but will if there be one, and covenants to indemnify the husband against her debts; and if no such covenants. See *Pre. Ch. 196*, *Augier v. Augier*. So at law his covenant with trustees to pay an annuity to his wife, in case of a present or future separation, is valid; 2 East 283, and Ch. 19, a. 6, s. 2. But will not enforce the contract to the injury of creditors or purchasers of the husband, unless he is to be indemnified by the trustee's covenant against his wife's debt. 2 Bro. C. C. 20, *Stephens v. Olive*; 4 Cruise 398, 399.

9 Ves. 486.—
2 Ves. jr. 138.
—2 Vern.
386, *Seeling v. Crawley*.
—2 Atk. 511.
10 Ves. 191.

§ 16. *Her contracts void, not relating to her separate estate.* Newland, supported generally by the authorities, says, "the contracts of married women differ from those of infants; for the former, considered without reference to their separate property, are absolutely void, and therefore incapable of confirmation;" yet we find many cases, several of which are cited in this work, in which her contracts have, in fact, been deemed confirmed.

New. on Con.
31, cites
3 Burr. 1806;
and 2 P. W.
144.

§ 17. A court of equity regards more an assignment of the wife's property, by the husband's contract, than an assignment by mere operation of law.

1 P. W. 469,
Worral v. Marlor.

§ 18. *How he may dispose of her term in trust.* House of Lords held, that where a term is assigned in trust for a wife, by a first husband, her second husband could alien the term; but not where assigned in trust for her by the husband's consent; so if assigned in trust for her separate use; 2 Vern. 270; and if to raise a sum of money for her, instead of the term itself being in trust for her, makes no difference; here the assignment in trust for her, was before her marriage. Yet if money be left in a trustee's hands for the wife's benefit, and the husband dies, it goes to her, he not having disposed of it. Where he can assign; his assignee has the benefit on his bill.

1 Vern. 7,
Turner's case; & 18,
Pitt v. Hunt.
—1 Eq. Ca.
Abr. *Walter v. Saunders*;
ib. 63, &
1 Vern. 161.

§ 19. *Her chose in action.* He can assign by contract, for a valuable consideration, her particular chose in action, or article, her equitable property, as he can her term, in trust for

Pre. Ch. 325.
Povey v. Brown.—
New. on Con.
126, 129, 130,
P. W. 459.

131.—2 Atk. 417.—1

CH. 19. her, as a legacy given her before marriage &c. A material
 Art. 4. difference between his specific, and general assignment ; if of
 a particular thing, the assignee has it without making any provision for her ; *secus* if of her interest generally.

2 Ch. R. 41,
 Lane v. Norman.—
 2 Ves. 264.—
 2 Ch. R. 42,
 Howard v. Hooker.—
 2 Bro. C. C. 360 ; but
 1 Vern. 408.
 —2 P. W. 367, 674.—
 2 Vern. 17.—
 1 Ves. jr. 26.
 —2 P. W. 676.—2 Bro. C. C. 145.
 1 Bro. C. C. 50.—New. on Con. 133, 137, see cases.

Co L. 351,
 352.—2 Bl. Com. 435.—
 Reeve's Dom. Rel. 3.
 Co. L. 351,
 352.—2 Com. D. 84.

11 Mod. 246.
 —Chitty 57,
 58, 97.—
 6 D. & E. 616.

32 H. 8, 37.

§ 20. Her voluntary bond before marriage is void, if during the treaty, and just before marriage she enter into it, as to a brother, husband not privy, it is fraudulent as against him ; otherwise if given on a valuable consideration. There seems to be the same rule in equity if she so conveys away her property, through a provision for a child by a former husband ; *secus*, if before the marriage treaty commences, and she uses no means to deceive him ; and even though for her own separate use, and he has no notice of it ; and valid, if for such child, if proved she meant no fraud, as against him, but a fair provision for such child, and especially if done before such treaty begins.

§ 21. *Her surviving right to her chose in action.* It survives to her, if her husband does not reduce it into possession in his life time, and if he by contract assign her property in action for a valuable consideration, if his assignment be of a general nature, it will not bar her survivorship, though on a valuable consideration ; *secus*, if of a particular chose in action, or of an equitable specific part of her property of that nature.

ART. 3. *The effect of his recovering a chose in action, that was hers &c.* § 1. If he recover such chose in action during the marriage, it is absolutely his ; but if he die, her choses in action survive to her, for he neglected to exercise his power over them when he might have done it ; and if she die, those rights, that at her death remain *choses in action*, shall not survive to him, because he never was in possession during the marriage ; otherwise of a chattel real, because of that he is in possession by a kind of joint tenancy. But if she be dispossessed of a chattel real before marriage, or have only a right thereto, he shall not have it as survivor, unless he shall recover it during the marriage : and a share on the statute of distribution is a chose in action, till recovered ; and cannot be sued for by the heir till distributed to him. 1 Day's Ca. in E. 150, 155.

§ 2. And if a note be made to her, *dum sola*, and he, after their marriage, endorses it, the endorsement is a disposition of it. And a note or bill, made to a married woman, is made to the husband ; and a debt due to the wife of the bankrupt, may be assigned by his commissioners. So he may absolutely dispose of her choses as he pleases, 1 Rol. Abr. 343 &c., during the marriage.

ART. 4. *Her rents.* § 1. By the statute of Hen. VIII, if a man have, in the right of his wife, any estate in fee, in tail, or for life, or in any rents &c., and the same be unpaid in her

life time, the husband after her death, or his executor, or administrator, shall recover them.

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§ 2. If rent be due to a woman, and she marries, and her husband discharges rent due at a later day, this bars all arrears; but this rule here must be understood as it is in general, that is, such an after discharge bars prior rent, where there is no evidence to rebut the presumption thence arising; but not where there is direct evidence, the prior rent has never been paid or discharged. The husband can lease or bind her freehold or inheritance, only for his life, nor can her term in his possession be taken in execution for his debt after his death.

Dyer 271,
Morton v.
Hopkins.—
1 Stra. 229.—
72 Baron &
Feme, 9 H.
6, 62.

ART. 5. *His rights as her administrator.* § 1. By this statute of Charles II, he has administration on her estate, and shall recover and have to his own use, her personal estate the same as before the 22d Ch. II, was passed.

29 Ch. 2.—
Ch. 3, s. 26.
—2 Bl. Com.
435.

§ 2. In this case it was made a question, if the *baron* who administered on his wife's estate, and recovered her debts, was not bound to make distribution to her kindred, the statute of distribution being general. If A marry an executrix &c., he has all her power to administer.

2 Mod. 20,
22, Wilson v.
Drake.—
2 W. Bl. 801.
—3 Wil. 277.

§ 3. But since, it has been determined, that he not only has administration on her estate, to recover choses in action, but that he "shall retain them to his own use; and if he die before administration is granted to him, or he has recovered his wife's property, the right to it passes to his personal representative, and not to his wife's next of kin;" but he is held to pay her debts out of her estate. 6 Johns. R. 112.

2 Bl. Com.
Christian's
Notes 56.—
1 P. W. 378;
but Co. L.
351.—1 Bl.
Com. Ch.
115.

§ 4. By this statute, administration shall be granted to the widow or next of kin, so by construction to the husband of kin, and if he, as administrator, recovers a debt due to her, he is not held to make a distribution; this is law in such States as have adopted this or like acts.

Mass. Act
of March
9, 1784.—
2 Wood's
Con. 168.

§ 5. In this case the court decided, that if the husband survive, he shall have administration on her estate, to his use; and if he die, his right to administer on her estate goes to his representative; that there is no provision in the act to compel him to make distribution, and that he stands on the ground of the old law. In this case the husband recovered a legacy that had been bequeathed to his wife, and her father claimed a distribution as her heir. It is clear the husband is not next of kin to his wife. 3 Ves. 247.

Mass. S. J.
Court June
1796, Nurse
v. Ray.—
2 Stra. 891.
Reeve's 17,
18.

§ 6. In this action the court decided, that the husband's right of administration to his wife, is transmissible to his representative, and shall not go to her's; but if the husband dies before he reduces the wife's right into possession, and she survives and then dies, her representative shall have administration.

1 Wils. 168,
170, Elliot
ex'r. v. Col-
lier & ux.;
doubted
1 Hen. &
Man. 233.
Lyon J.

CH. 19. The right here was an orphanage share that came to the wife during the marriage. Her power as executrix &c., see Art. 6. Ch. 29, Executors and Administrators.

Salk. 116 —
1 Mod. 179,
Woodyer v.
Gresham.—
3 Mod. 186.

ART. 6. *His right by judgment &c.* § 1. If the wife, while sole, recover judgment, then she with her husband bring *scire facias*, and have execution awarded, and she dies; by the award of the execution, the debt is altered and survives to him.

3 Mod. 186,
189, Obrian
v. Ram.

§ 2. And by the same rule, where judgment was recovered against a *feme sole*, who afterwards married, and a *scire facias* was sued against both, and judgment that the plt. have execution against both; after this award, and before the execution was executed, the wife died, and after her death it was held proper to issue a new *scire facias* against the husband; which, said the court, proved the award of execution made a plain alteration. So was the case of Obrian v. Ram.

3 Selk. 63,
part of the
case above.
—10 Mod.
163.

§ 3. So if husband and wife recover judgment for her debts or damages; so if judgment be against them for her debt, or against her while *sole*, and on a *scire facias*, execution is awarded against them. On her death he alone is liable; and he and not his wife must be taken in execution for her debts contracted before marriage. But according to the authorities generally, though in no case can she, in a civil action, be imprisoned without him, except for a reasonable time to take him, yet she may be imprisoned with him, where judgment and execution are against both.

Gilb. cases
318.—
1 Mod. 179.
—3 Mod.
189.

If both recover judgment for her debt, the survivor has it, if uncollected. She, if she survives, has it not only as the surviving plt., but because the debt is hers, not collected by her husband; for the judgment is not a collection of it.

1 Sid. 537.
Office of
Ex'r. 293, 294.

But if he survives, he has it without account, but to his own use, on the principle of *jus accrescendi* of joint tenancy; on it this judgment belongs to him absolutely; husband and wife are joint tenants of the judgment. Every joint judgment must be collected by the surviving plt. or plts. This is law among all; but the material question is, when the surviving plt. enforcing the judgment is to account for the amount of it; a surviving merchant, a partner, plt. alone enforces it, but accounts for the amount; the husband does not in those States, in which the *jus accrescendi* of joint tenancy exists; but quære if he must not as respects his deceased wife's creditors. But where there is no *jus accrescendi* in a State, the surviving husband not only collects this judgment to the use of his wife's creditors, but if none, then to the use of her next of kin, where there is no such statute as the 29th Ch. II; but in the States where there is, then to his own use, by reason of such statute, though there be no such *jus accrescendi*.

So if judgment be obtained against husband and wife, for her own debt, not one she owes as executrix or administratrix, and one dies, it survives against the other. If he dies first, or there is a divorce, it survives against her, not only as surviving deft. &c., but because it is her debt. If there be a divorce, it must be enforced against her, and on her death, her representatives; as in case of a divorce she and they would have the benefit of a judgment recovered by her and her husband for her debt; but if after judgment against *baron & feme* for her debt, and before any *scire facias*, she dies first, the better opinion is it must be enforced against him.

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ART. 7. *The husband's rights when a bankrupt.* If he become a bankrupt, debts due to his wife, while *sole*, though not collected, may be assigned as his property; so he is discharged of such a debt as she owed, on the 11th of Anne, Ch. 7. See Ch. 18, a. 2, above. The Act of Congress of April 4, 1800, is the same. So the assignees of the husband have all such powers over her debts as he had. Reeve's Dom. R. 5.

10 Mod. 160,
164, 244, 247.

ART. 8. *How he is liable for her debts or not &c.* § 1. If she owes debts before marriage, he must pay them; for he adopts her with her circumstances; and because he has her personal estate forever, and the profits of her real estate during the marriage, he becomes liable, and is so during the marriage, but she is the debtor still, and so joined.

1 Bl. Com.
443.—3 Mod.
186.—
10 Mod. 163.
—1 Bac. Abr.
292, 3.—
Reeve's Dom.
R. 2.

§ 2. But he is not liable for them after her death, unless judgment be had against them before. But they survive against her.

Gillb. Cases
361.—2 Bl.
Com. 433.

§ 3. Nor is he bound to maintain her child by a former husband, or her mother, or his son's wife, for the poor laws in England and Massachusetts, confine this obligation or duty, to relationship by consanguinity only; and so do the poor laws generally in the United States; but is liable to maintain such children, if he adopt them into his family &c. 3 Esp. R. 1; 4 East 82.

4 T. R. 118,
Tubb v. Har-
rison.—Mass.
Act of Feb.
26, 1794, s. 3.

§ 4. And if a *feme* administratrix commits waste, and then marries, her husband is liable therefor, during the marriage. The law is the same of any other tort or fraud, *civiliter*.

Cro. Car.
603, Kings v.
Hilton & ux.

§ 5. The husband is bound to find his wife necessaries, according to his estate and degree, but only these, and to discharge her contracts for them; and this is on his presumed assent, and this is presumed only while they cohabit. In this case, Holt C. J. held, that if a husband turn away his wife, he gives her credit wherever she goes, and must pay for necessaries for her.

1 Bac. 293—
1 Esp. 120.—
1 Salk. 118,
Etherington
v. Parrot.—
Imp. 241.—
2 Stra. 1214.

§ 6. But if she runs away from him, he shall not be bound by any contract she makes; so if she merely elopes.

Stra. 876,
Child v.
Hardyman.

CH. 19.
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1 Esp. 124.—
1 Mod. 124.
6 Mod. 171.
—1 Salk. 119,
Robinson v.
Granold.—
1 Esp. 122,
123.

Stra. 647,
Morris v.
Martin.—
1 Esp. 124.
2 Stra. 1214,
Bolton v.
Prentise, ci-
ted Bul. N. P.
135, & 1 Esp.
122.

1 Sid. 109,
Scott v.
Manby.—
Mod. 128.—
Imp. M. P.
242, 243.—
2 Ld. Raym.
1004.

Bul. N. P.
134.—Imp.
M. P. 248,
Longworth
v. Hackmore.
3 Salk.
Stra. 118.—
1 Esp. 120,
121.—1 Salk.
118.—Imp.
250, 254.—
6 T. R. 608,
Govier v.
Hancock.—
A. D. 1792,
Dyde & al. v.
Bewicke.

§ 7. While they live together, he shall answer all her contracts for necessaries, and his assent is presumed.

§ 8. But if the contrary appears, as by warning him who trusts her, or his servant, then there is no room for such a presumption. Holt C. J. held, that though she be ever so lewd, he is bound to find her necessaries, and pay for them, while they cohabit, for he takes her for better for worse. So if he runs away from her, or turns her away. But if she goes away from him, when such separation becomes notorious, whoever gives her credit does it at his peril; for the husband is not liable unless he takes her again; for then it is as if a woman had eloped at common law, when she thereby lost her dower; but if she came again, and he received her, the right of dower was revived.

§ 9. And the husband, in case of elopement, is not liable, though the plt. who trusts her does not know she eloped.

§ 10. In this action of *assumpsit* for goods sold to the wife, it was held, that if the husband, without any cause, leave his wife destitute, and refuses to receive her, he gives her a general credit. He is a wrong-doer, and "has no right to prohibit any body" to trust her; for if he might prohibit one, he might another, and so deprive her of all credit.

§ 11. But this prohibition to a particular person may be given. As where the wife left her husband without his consent, and during her absence he prohibited several persons, and among the rest J. S., to trust her, who sold silks and velvets to her, after her husband refused to receive her, suitable to his degree; and it was held, that he was not liable. Here also she eloped; but in this case Lord Hale held, a tradesman cannot supply the wife where there is an *express prohibition*. Warning a tradesman's servant not to trust her is sufficient.

§ 12. The husband is bound on his express or implied consent for her necessaries for herself, her children, or family; but when she departs, all evidence of any obligation of the husband to maintain her, ceases.

§ 13. Though the husband and wife cohabit, yet he may forbid any particular tradesman to trust her, and such prohibition to his servant is enough; and if she elope from her husband, he is not liable, though the tradesman who trusts her has no notice of her elopement. It is sufficient for the husband to give general notice, that tradesmen &c. should not trust her. If she take up goods, and pawn them, he is not liable; nor can she borrow money even to pay for necessaries. Nor is he liable if she take up goods beyond, and not "according to her situation, and according to his situation in life;" nor after she commits adultery, though he himself had committed adultery, and had turned her away without cause.

§ 14. But if the husband so ill treat his wife as to make it proper for her to leave him, he is bound. As where *assumpsit* was brought against the executor of the husband, for about three years board of his wife, by her mother, the plt., in his life time. It was proved, that Armer and his wife lived happily together seven or eight years in Boston, and both employed themselves in making shirts; that about 1791 he began to be intemperate, and she lost her health, became nervous, and at times a little disordered in mind; that they began to differ, and he several times used her ill, beat her, &c., when she left his house, and went to her brother's-in-law, and sometimes to her mother's; that she returned to his house several times, on his solicitations, but the last time she refused to return, and lived with her mother about three years, and until her death. He asked her to return, and said he would use her well; but she declined, and her mother discouraged her returning, and he told the mother that he would not pay any board for his wife; the wife however continued with her mother, who supported her, and charged her board, part \$2, and part \$3 a week.

CH. 19.
Art. 8.

Mass. S. J.
Court, Bos-
ton Aug.
1796, Bra-
dish v. Huse.
ex'r. of Ar-
mer.

Judgment for the plt. for \$350, the price charged; this action being against the executor of the husband, the wife's deposition was admitted. The court recognized the general doctrine of giving credit, and added, that if a man do not actually turn his wife out of doors, yet if he beat her, and treat her in such a manner as to make it necessary for her to leave him, and seek her support in another place, he shall be held to pay &c. But if a tradesman furnish goods to the wife, it is a question of fact if he give credit to her or to her husband; if to her, he is not liable, though she lives with him, and he sees her in possession of the goods. 5 Taun. R. 356, 358, *Bently v. Griffin*.

§ 15. In *assumpsit* against the husband for the lodging of his wife; the evidence only was, "that he cohabited with her, and owned her as his wife. Held, this was sufficient to charge him; but that he might discharge himself by giving elopement in evidence; for they that trust a wife who has eloped do it at their peril.

12 Mod. 372,
Case v.
King—
Lofft 782.

What is assent to her purchases. The wife bought silks for her apparel, and the husband paid for making them up, this was sufficient evidence of assent.

Dyer 224.

§ 16. If one man take another's wife and clothe her, knowing she is his wife, no action lies against her husband, the law intends it a gift to the wife. So if I deliver stuff to her to make apparel without his privity or allowance, no action lies for me, it is a gift in contemplation of law. This is a general principle, but it must have its exceptions; as where a husband,

Pow. on Con.
266.—3 Cro.
344.

CH. 19. without cause turns away his wife, and she, in distress, applies
 Art. 10. to a friend, and he furnishes her suitable and necessary clothing, he must recover against her husband.

Moseley's R.
 126.—1 H.
 Bl. 345.

§ 17. And if he be bound to keep the peace towards her, *not to maintain her* is a breach of his recognizance. At common law, a wife could not convey her lands but by fine or recovery; our law is different.

Salk. 118,
 Todd v.
 Stoakes.—
 Im. 51, 249.
 —Ld. Raym.
 444.—
 12 Mod. 245.
 —1 Esp. 124,
 125, Ramsden
 v. Ambrose.

ART. 9. *Where they live separate.* § 1. When it is commonly known they have separated, and she has a *separate maintenance*, the husband is not chargeable. Personal notice is not necessary, it is enough it be known they live separate, where their home is, not where she is trusted. When they separate by *consent*, and he secures her an allowance, it is, that he be not charged any more for her, but he is liable if he neglect to pay her separate maintenance. 5 Bos. & P. 148, Nurse v. Craig; 8 Johns. R. 72, 73, Baker v. Barnes. But how far she can be sued, see Post.

1 Stra. 127,
 Harris v. Col-
 lins.—Bul. N
 P. 136.—
 1 H. Bl. 344,
 351, Compton
 v. Collision.—
 Reeve's D. R.
 152.

§ 2. But if the debt be contracted in London so soon after the separation, as that it cannot be known there, he will be liable, and Buller, Espinasse, and some others say, that if the action be brought for necessities, or the maintenance of the wife living thus separate, it should not be laid as furnished to him, but the special matter must be stated, otherwise it will be no bar to a special action for her maintenance, and in this case 335, held, where he has renounced his marital rights and to the *usufruct* of her estate, she can convey it by deed without him, living separate from him by articles, as no right of his can be infringed.

8 T. R. 545,
 547, Marshall
 v. Rutton A.
 D. 1800, and
 cited Chitty
 23, 24.—
 1 Bin. 582.—
 1 Ves. jr. 529.
 See this point
 considered
 above.—
 11 East. 301.

ART. 10. *Her separate liability.* § 1. In Lord Mansfield's time, the law as to her liability, seemed to be changed; as in Corbett v. Poelnitz, and some other cases; but in this case of Marshall v. Rutton, since, and in the year 1800, the old law was thought to be restored. In this case it was held, by all the judges of England, that a *feme covert* cannot contract and be sued as a *feme sole*, even though she lives separate from her husband, and have a separate maintenance secured to her by deed; and the general principle is, that she cannot be separately liable, but where he is *civilly dead*, but as her separate maintenance in fact secured to her, is in order that he may be exempted from her maintenance, he is not liable. See art. 15.

1 Esp. 124,
 125, cites
 Corbett v.
 Poelnitz,
 1 T. R. 5, 10.
 —Loft 134.—
 Agreement
 in writing, to
 3 Burr. A. D.

§ 2. It is laid down by Espinasse thus: "Where the husband and wife part by consent, and she has a separate maintenance from him, she shall in all cases be subject to her own debts." In Corbett v. Poelnitz it is held, she may contract and be sued as a *feme sole*, in an action against a second husband, who lives separate, is valid, 8 Johns. R. 72.—So if transported.—1 T. R. 5, 10.—1785.—2 Esp.—1 Bos. & P. 357.—2 do. 226, 227.—2 Br. Ch. R. 90.

band and wife, for a debt *she contracted while she so lived separate from her first husband, Percy*. The declaration stated the special matter; plea, the general issue, and on argument, judgment was for the plt. who had become her surety.

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Art. 10.

§ 3. *Equity views her as sole, as to her separate property*. In *Corbett's* case, Lord Mansfield and the court stated the general rule, that "a married woman can have no property real or personal;" her contracts are entirely and universally void; for her contracts even for necessities are the contracts of her husband; she cannot be sued or taken in execution. Then the exceptions to this rule are, as where the husband is *in exile*, or has *abjured the realm*; and credit has been given to the wife alone. So in the case of *transportation*, though temporary, because she acts as a *single woman* and gains credit as such. So if the husband resides abroad, his wife is liable to be sued. 1 Bos. & P. 357.

Pow. on Con. 77, 110, 63,
Peacock v. Monk, a. 22, s. 14, 15, &c.
—2 Vern. 613,
Dubois v. Hole.—
2 W. Bl. 1196,
Lean v. Schutz.

§ 4. "In this ancient law there was no idea of a *separate maintenance*; but when it was established what said the courts? That the husband shall not be liable even for necessities," and this, because justice and convenience required it. And the court clearly held, that if *lady Percy* was liable, her second husband was liable. Lord Mansfield further, in this case, stated the question to be, "whether a woman married, but living separate from her husband by agreement, having a *large separate maintenance* settled on her, continuing notoriously to live as a single woman, contracting and getting credit as such, and the husband not being liable, shall be sued as a *feme sole*," and he held that she might be, and thought it just that it should be so; and also, that the case was determined by two, then late cases, *Ringstead v. Lady Lanesborough*, and *Barwell v. Brooks*. In *Corbett's* case, Lawrence J. truly observed, "that the husband had no right to the person of his wife afterwards."

2 Com. D. 70.
—Or if he cannot be found. Fr. Ch. 323,
Bell v. Hyde.
—2 Esp. R. 564, 567.—
Art. 14, 15, s. 10.—4 D. & E. 361,
Candell v. Shaw.—
2 Bos. & P. 93, Beard v. Webb.—
Moore 861.—
2 Vern. 104.
—11 East 308.

§ 5. In this case of *Ringstead &c. assumpsit* was brought for goods sold and delivered; plea, *coverture*. Replication, "that she lived separate from her husband at the time of making the said promises, and that she had a large and sufficient maintenance secured to her by deed;" to this there was a special demurrer. After two arguments, the replication was adjudged good, and judgment for the plt. Lord Lanesborough lived in Ireland. Judge Reeve holds her suable merely on the principle, her husband *has renounced his marital rights*, not on the ground of separate maintenance; as if so, that would be the measure of her liability.

Ringstead v. Lady Lanesborough, 23 Geo. 3, B. R.
—Cooke's Bank. Laws, 24, A. D. 1783.
Reeve's D. R.

§ 6. In this action, *Barwell v. Brooks*, also assumpsit against the wife for goods sold and delivered on her separate promise, and a like division was made, that she was liable to be sued alone for the goods delivered to her, though her husband re-

Barwell v. Brooks, 24 Geo. 3. B. R.—Cooke's Bank. Laws, 28, A. D. 1794.

CH. 19. sided in England. In *Marshall v. Rutton*, Reeve admits the reasoning of the court goes to overturn this and like cases; but says in *Marshall v. Rutton*, the husband had not renounced his marital rights.

2 P. W. 144, Norton v. Turrill
Cited 6 T. R. 606.—
15 Mass. R. 31.
§ 7. Her *separate* estate is liable for her bond debts, and other debts she contracts; so *Hulme v. Tenant*. So she is liable when her husband is an *alien enemy*. 2 Salk. 646; Reeve's D. R. 100, art. 15. So she may sue alone, if her husband be an alien, and ever lives abroad and deserts her.

1 Esp. 126.—
Cites Co. L. 132, 133,
Dury v. Mas-
sarum.—Salk
116.—
1 Ld. Raym.
147, Sparrow
v. Carruthers.
—2 W. Bl.
1197.
ART. 11. *His being an alien enemy, the effect, &c. as to this action.*

§ 1. Espinasse states the rule to be, that "*wherever the husband is in circumstances not to be sued, as not amenable to the process of the court, the wife shall be sued as sole;*" as where the husband is an *alien enemy*, or has abjured the realm, the wife is chargeable as a *feme sole*; so where he was *transported*; so if she be a *sole trader in London*, 1 H. Bl. 337, 339; stated her husband was an *alien enemy*, New. on Con. 22, 23.

§ 2. As to her contracts, as warranties, &c. for the benefit of her estate, see Covenant, c. 106, a. 4.

§ 3. We have no statutes, but have adopted the principles of the English common law on this subject. Hence these English cases are applicable in our practice. She may plead alone when he is transported. An *alien* cannot be a tenant by the courtesy, or have dower. 31 E. 1. Held, the wife of one who had abjured the realm could make a feoffment by deed with warranty of her land, and she was bound by it. Several like cases.

Loft 131.—

Baron &
Feme.—
1 H. Bl. 346.

Mass. S. J.
Court, Nov.
Term, 1800,
Wheeler v.
Wheeler,
1 Mass. R.
341, and art.
19, this ch.—
Orrok v. Or-
rok.
ART. 12. *When divorced from bed and board; this action, and how affected, and Ch. 46, Divorce.*

§ 1. In this case *Mrs. Wheeler* had been divorced from her husband from bed and board, and the court ordered Mr. Wheeler to pay her a certain sum, quarterly, for her maintenance; this being in arrear, she brought her action against him, to recover the arrears, and it was objected that the plt. was the deft's. wife, and therefore that she could not maintain her action, but the court sustained it, from the necessity of the case. And as he cannot be liable beyond the maintenance, or annuity, or other sum directed to her in the order of divorce, and only in the manner therein directed, which usually is, to pay so much quarterly or yearly, it seems clear that she alone must be liable for what she buys or contracts for, or she can have no credit, and no one can have any security in her promises or contracts; and can there be any doubt but that she may buy on credit and be sued?

§ 2. In a case before the lord chancellor, in equity, he said,

2 Ves. jr. 145,
cited 6 T. R.
606.

"if the husband and wife be separated by deed or sentence, an action may be brought against the wife alone;" but Lord Kenyon doubted, if the separation was by *deed*, as then, it was but *temporary*. A distinction here is to be noticed that deserves attention: when the separation is by sentence of a court, it is in law perpetual, as there is no provision made for revoking it; and if husband and wife thus separated from bed and board, again live together, it is contrary to the decree of the divorce, this the law does not presume. But if they separate by *deed*, the parties that made it can cancel it, or vary the terms of it. Hence it is pretty clear, that though *Mrs. Wheeler* was allowed to sue her husband when separated by judgment of court, yet she would not have been allowed to sue him on a contract made by *them*, had their separation been by *deed*. A legacy to the wife, *living separate*, and the executor paid it to her and took her receipt for it; held, he must pay it again to the husband.

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Art. 14.



ART. 13. *Where she is not liable to be sued, though living separate.* Though she live separate and have a separate maintenance, yet she is not liable to be sued if it be not *from her husband*, and then he is not discharged. As where she has a *pension*, during pleasure, from the crown; "here is no agreement for a separation;" "he allows her no separate maintenance, or any support at all." Equity assists her creditors only to the extent of her separate maintenance, and in equity she can have a separate interest. It must be on account of the separate support and allowance the *husband himself* makes for his wife, that he is exempted from maintaining her in the usual manner; and when he does not make this, the reason of the case or the consideration wholly fails; there is no reason for exempting him from paying her debts, or for making her liable for them, and it may be added, while he retains his *marital* rights.

1 Vern. 261.
—Baron and Feme, 70, 71.

—1 Esp. 125, 126.—Thompson v. Harvey, 4 Barr. 2177, 2178.

Pow. on Con., 101, 109, 110.
—3 P.W. 335.

ART. 14. *Where she elopes*—she is not liable for goods furnished her, though her husband is not liable. As where she was sued as a *feme sole*, for a carriage furnished her by the plt. during her *elopement*. Pleas, *non assumpsit*, and also, *coverture*; verdict for the plt., but judgment was arrested. For though she eloped, she remained a *feme covert*, not having a *separate maintenance or living apart from her husband, by his express permission*; but certain exceptions were stated as in the *custom of London, exile, transportation, alien enemy, &c.* It seemed to be the opinion of the court in this case, that no action whatever lies against a *feme covert*, except where her husband *may be considered as dead in law, and herself as a widow*, or after a divorce *a vinculo*. But two decisions in 1799, were different; as where her husband lived *abroad*, it

A. D. 1776.
2 W. Bl. 1079.
Hatchell v. Baddeley.—
6 Mod. 171.

A. D. 1799.
1 Bos. & P. 351, DeGallion v. L'Aigle, Id. 338, Cox v. Kitchin.—
See 1 Phil. Eyid. 149.

CH. 19. was held, she was liable ; so where she lived separate in *adul-*
Art. 15. *tery*, without any separate maintenance in either case. There does not appear to have been any case of a divorce from *bed and board* in the English courts, in which the question has arisen, if she may sue her husband as in *Wheeler v. Wheeler* above, for the maintenance decreed her. *Marsh v. Hutchinson*, husband abroad in Holland, wife not liable, not having acted as a *feme sole*, and he not an alien. Here was no separation but merely that of *place*.

2 Bos. & P.
226.

6 T. R. 604,
Clayton v.
Adams exr.—
Chitty 23, 24.

ART. 15. *She is not liable to be sued, though she carry on trade by herself and live apart.*

§ 1. *Assumpsit* was brought against an executor for goods sold to his testatrix, Mary Byrne. The plea was *coverture* ; the replication was, that she lived separate from her husband, and carried on the trade and business of a haberdasher, as a *feme sole*, and the plt. dealt with her only, and *as such*, and as a *feme sole* she promised, that after her death the deft., as her executor took and possessed divers goods, which were in her possession as a *feme sole*, more than to the amount of the plt's. damages. The deft. demurred and had judgment ; and Lord Kenyon said " it did not appear this could have been the separate property of the wife," and the executor could not be liable unless it was ; and the probate of the will " was absolutely void ; and to take the wife in execution when sued alone is as a divorce between her and her husband. Lord Kenyon added, that " if any one proposition in the law can be more clear than another, it is this, that an action cannot be brought against a *feme covert* except by the custom of London."—" A court of law cannot get at the property of the wife, if she have any," but a court of equity may modify it, &c.

§ 2. But the reasons here stated do not apply with much force to a case where they live separate, and there is a separate maintenance ; for in this case there is no inconvenience to the husband in her imprisonment, and why may not the execution run against her separate property, secured to her. But the case of *Marshall v. Rutton* is a late case, and is pointedly against any action of this kind, if the separate maintenance be good &c., and the marital rights renounced.

1 Wils. 149.
2 Stra. 1237,
Harrison v.
Beardcliffe.—
1 Esp. 467.

§ 3. According to *Langstaff v. Rain & ux.*, the husband and wife may both be taken in execution in an action for the assault done by the wife ; this was decided on a motion to discharge the wife out of custody, and the motion was refused on the authority of *Finch & ux. v. Dudding & ux.*, in which case the wife alone was taken in execution, where the husband could not be found. Both may be taken on a *capias* in execution.

Stra. 1271.—
Salk. 115.

§ 4. But if arrested on *meine process*, she shall be discharged

ed, and her husband retained until he find bail for both. *Str.* 116.

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Art. 15.

§ 5. In *assumpsit* for goods sold and delivered it was decided that a *feme covert*, living separate from her husband, and in adultery, could not be sued as a *feme sole*, where she had no separate maintenance. [There was no abandonment of his marital rights;] but 1 see *Bos. & P.* 338.

4 T. R. 766,
Gilchrist v.
Brown.

§ 6. But A. D. 1799, the contrary was adjudged, and that if she live apart from him, in a state of adultery, she is liable on her own contracts, though she have no separate maintenance; but he is liable, if she live in a state of adultery in his house and family, and he leaves her there. In this last case, the person who trusts cannot know her situation, and cannot be supposed to give credit to her, but to the husband, the head of the family.

1 *Bos. & P.*
338, *Cox v.*
Kitchin.—
2 *Com. D.* 70.
—1 *Bos. & P.*
226, *Norton*
v. Fagan.

§ 7. *Assumpsit* for use and occupation. The deft. pleaded *coverture*; the plt. replied, that before the promises were made, to wit., July 1, 1779, the deft. and Charles Leigh were separated, and that July 2, 1770, a certain court in a suit pending between them allotted to her £220 a year, as alimony during that suit: that this suit was still pending, and that her alimony was a sufficient maintenance, and still paid by her husband; and that she obtained credit thereon upon her own account, and on her own account made the promises declared on, as a *feme sole*, and not on the credit of her husband. On demurrer this replication &c. was held to be bad; for here the wife had only a temporary fund, pending a suit, to which an end may be put by the husband when he pleases, or by the court. It may be observed there were no articles of separation, and no covenants.

A. D. 1794,
6 T. R. 679,
668, *Ellah v.*
Leigh.—6 D.
& E. 604.

§ 8. So in the case of *Marshall v. Rutton*, her support was temporary; for the wife had it in her power to put an end to the separation whenever she pleased, and in fact there was no legal separate maintenance, for want of trustees; the agreement was only between the husband and wife. In citing this case, this circumstance, a want of a permanent fund or maintenance, legally secured to the wife, has not been sufficiently attended to. And there is no objection to imprisoning her alone, when the separation is so complete, and he has so renounced his marital rights, as not to be affected by it; and then Lord Kenyon's idea her separate imprisonment is a divorce, does not apply; this idea, as also Lawrence's, seems to countenance Reeve's principle, as to the abandonment of marital rights.

Marshall v.
Rutton.

§ 9. So that on the whole, though there have been several *dictums* contrary to the decision in the case of *Corbett v. Poelnitz*, yet there has been no decision directly contrary to it, or

CH. 19. that can materially shake it. In *Marshall v. Rutton*, the wife
 Art. 16. had no remedy for her maintenance, as she could not sue her husband.

3 T. R. 627,
 Milner v.
 Milner.

§ 10. If a *feme covert* be sued as a *feme sole*, she must plead this in abatement; and if she do not plead it in abatement, she cannot afterwards avail herself of the objection, but must be liable to execution. 1 New. Rep. 80, *Farrar v. Granard*, wife not liable, no separate maintenance and her husband only in Ireland.

Imp. M. P.
 248—
 26 Geo. 3,
 Hudson v.
 Birt.

ART. 16. *Marriage in fact, or by acknowledgment, binds the husband in regard to her contracts for necessities.* § 1. As if a man cohabits with a woman, and allows her to assume his name, and passes her to the world for his wife, though in fact he is not married to her, yet he is liable to her contracts for necessities, because by his conduct he has admitted her to be his wife, and has encouraged third persons to give her credit accordingly; and here when sued for goods furnished to her, he is estopped to deny that she is his wife.

Bul. N. P.
 186, Nor-
 wood v. Ste-
 venston.—
 3 Salk. 64.
 Salk. 119,
 case post,
 Haydon v.
 Gould.

§ 2. It is laid down in several books, that the plea, never coupled in lawful marriage, is good only in dower and appeal, and is no plea in *assumpsit* for a debt contracted by the wife, only the fact of marriage is in issue.

§ 3. But seven years cohabitation, without a legal marriage, does not entitle the husband to administration on his wife's estate; and there are other cases in which legal marriages must be proved, though it is true that never coupled in lawful marriage, is no plea in this action of *assumpsit*, for it is enough he lives with her as his wife.

4 Burr. 2067,
 Morris v.
 Miller.

§ 4. In an action for *criminal conversation* with the plt's. wife, an *actual* marriage must be proved. In this case acknowledgment, cohabitation, or reputation, is not sufficient.

Salk. 437,
 Allen & ux.
 v. Grey.

§ 5. On a marriage in fact, the husband and wife may sue for her debt, and never coupled in lawful marriage is a bad plea; this plea admits a marriage, but denies its legality; "whereas a marriage in fact is sufficient, and whether legal or not, is not material;" but in pauper cases the legality of the marriage may be questioned. See *Poor*.

8 Mod. 22,
 Lister's Case.

§ 6. In this case it was held, that after an agreement between husband and wife to live separate, he cannot compel her to live with him, nor has he, by law, any power to confine her.

1 Mass. R.
 116, Com-
 monwealth v.
 Cullins.

§ 7. The wife of a person who has been absent six or seven years in the East Indies, cannot be considered or sued as a *feme sole*, though she for several years carried on business in trade as a *feme sole*.

Gro. El. 466.

§ 8. When a term for years is granted to a trustee for the use of a *feme sole*, and she marries A, he has only the *usufruct* during the marriage.

ART. 17. *When she is executrix or administratrix.* § 1. If a *feme covert* be next of kin, she shall be administratrix by the English law; but whether executor or administrator, her husband, in fact, administers, and his assent to a legacy is sufficient. So to a legacy to her, she cannot assent. Goods she has as executrix, on her death do not go to her husband. Cro. El. 466.

§ 2. If a *feme covert* be executrix or administratrix. Administration by her husband binds her. So if he administer without her assent, his release alone is good. So if he assign the goods it will be a *devastavit* by her, and she, without him, cannot dispose of the deceased's goods; yet his goods are not vested in the husband, and he must sue and be sued with her. When a *feme sole* is made administratrix or executrix, with another, and marries, see Executors and Administrators, Ch. 29, a. 1.

§ 3. A had a term for 999 years, and before he married B, granted it to her and her heirs immediately after his death, to her and their use. The marriage took effect, and A, the husband, survived B, his wife, and died without issue, intestate, and without having taken out administration on her estate, and it was adjudged that this term, on A's death, went to his administrator, and not to hers. Held, his deed was a present gift to his wife, if she survived, to take effect on that event, and so vested in her husband.

§ 4. A covenant or a promise by a stranger to leave the wife so much, if she survives, cannot be released by the husband, though he may release any thing that by possibility may accrue to her during the coverture; and such release will be good, though the thing does not fall during the marriage, but it is sufficient, that it may possibly fall during the marriage to her. During the marriage he can grant or convey a term for years, she has as executrix to a former husband; the whole power to administer is in him, but it is a mere power.

ART. 18. *In cases of abduction, his remedies.* § 1. If one by fraud and persuasion or open violence, take away a man's wife, he has a writ of *ravishment or trespass vi et armis, at common law*, in which he recovers not possession of his wife, but damages; and the offender too may be indicted. So the husband may have an action on the case, against such as persuade and entice the wife to live separate from her husband without sufficient cause, and recover damages. [As to criminal conversation, and beating her, see Trespass.] And see also Ch. 64, a. 2.

§ 2. So if the wife be so beaten and ill treated, that the husband loses her company and assistance, for any time, he may have a separate action on the case, in his own name, and recover damages called a *per quod consortium amisit*.

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Art. 18.

1 Com. D.
343.—Off.
Err. 321, 264.
—1 Leon
216.—1 Sid.
188, 337.
1 Salk. 117.
306.—Off.
Err. 297, 8.
Cro. Car. 519,
Morrison v.
Bourn.—
Reeve D. R.
26.—2 Vern.
118.—4 D. &
E. 616.

1 H. Bl. 535,
Doe v. Pol-
green.—
1 Com. D.
361, 2.

12 Mod. 294,
Cage v. Ac-
ton.—3 Wils.
277, Thrust-
out v. Cop-
pin.—2 W.
Bl. 801.

3 Bl. Com.
129, 140.—
F. N. B. 89,
(203.)—Cro.
Jam. 501,
538.—Cro.
El. 770.—
3 Burr. 1434.
Stra. 440,
579, 982.—
3 Bl. Com.
Chr's. notes,
1.

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3 Mass. R.
317, Turner
v. Estes.

§ 3. If a son-in-law permit his wife's mother to reside in his house, and afford her the rights of hospitality, though forbidden by the husband of the mother, the son-in-law is not liable for illegally harbouring her; he is not obliged to turn her out of his house; it is sufficient that he does not use means to persuade or entice her to leave her husband, or to remain separate from him.

1 Mass. R.
347, Martin's
case.

ART. 19. *Her title to his estate further; and see Dower, Distribution, Jointure, &c.* § 1. In the American revolution, many acts were passed for the confiscation of the estates of absentees, persons, members of the British colonies, who left them and joined the royal party, in that revolution. But it was in this case decided, that if a *feme covert* so left and joined, her estate was not liable to confiscation by those laws, nor did the wives of such absentees lose their dower in their husbands' estates.

10 Mod. 33,
Thomlinson
v. Dighton.—
1 Roll. 329.

§ 2. If a woman be empowered by her first husband's will to sell and convey his lands, and she marries a second husband, she does not thereby lose her power over her first husband's estate, but she may sell and convey his lands according to his will, and even to her second husband. She conveyed by lease, and release. Her act is under a special power.

2 Bl. Com.
Chr.'s. notes
56; but 1 P.
W. 729.—
2 Atk. 642,
79.—Ambl. 6.

§ 3. *Her paraphernalia.* The husband may absolutely dispose of his wife's jewels or *paraphernalia*, in his life time, yet she has some interest in them, and though after his death they are liable for his debts by the English law, if his personal estate be exhausted, yet the wife or widow may recover from the heir to the amount of what she is obliged to pay, in consequence of specialty creditors, out of her *paraphernalia*.

2 Esp. 336.—
Cro. Car.
343.—2 Vern.
246.

§ 4. If the husband devise away her jewels, or *paraphernalia*, she cannot hold them, and his executor may recover them from her; but if her husband dies intestate, or by will does not dispose of them, then she shall have her jewels and *paraphernalia*.

Mass. Act of
March 9,
1794. If not
extravagant,
Judge may
allow her all
the personal
estate,
15 Mass. R.
181.—2 Bl.
Com. 435, 436.
—2 Atk. 105.
—2 Ves. 7.

§ 5. By this act, the widow has a third of the personal estate of her husband, deceased intestate, after debts paid; and if no issue, one half; and if the personal estate be insufficient to pay debts, and funeral charges, yet she shall have "her apparel, and such other of the personal estate as the Judge shall determine necessary, according to her quality and degree." This provision being in addition to her dower, it is a question if it do not supersede the doctrine of *paraphernalia*, which also was in addition to dower, and which signified her apparel and her ornaments. See Act Dec. 13, 1816, Ch. 95.

By the English law she can hold her apparel against creditors, but not her ornaments. By the laws of Massachusetts,

the Judge of Probate may allow her to hold both, against her husband's will, or executors, &c. But if the judge make her no allowance, she has her apparel.

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§ 6. In this action the court decided, that the wife has a separate interest in her alimony, and may have execution even against her husband, on the Act of March 16, 1786. This was in a case of divorce, *a mensâ et thoro*, from the nature and necessity of the case; for otherwise she would be without remedy for her alimony, or means of support. In Connecticut *paraphernalia*, includes her beds, as well as clothing, and ornaments and trinkets, as bracelets, jewels, watches, rich laces, &c. Her clothing can hardly be considered her husband's estate, if suitable to her condition, it is not liable to his debts on the principles of the common law; and her proper apparel ought not to be inventoried as her husband's estate, nor can he devise it from her by his will; and Judge Reeve is of opinion he cannot her ornaments or trinkets, though he may take them and dispose of them during the coverture; on his death they vest in her, liable to be taken by his executor for the payment of the husband's debts, where there are not sufficient assets besides to discharge them; her right to them yields only to the rights of creditors. Her *paraphernalia* can never be taken to pay legacies; they become hers absolutely, after debts paid, and make no part of the personal estate of the intestate husband; and if her *paraphernalia* are taken to pay debts, she is viewed often as a creditor to the estate of her husband to the amount, in his life time, and after his death; as where he pledges her jewels &c., to raise money, and dies, and leaves more than personal estate enough to pay his debts. So if real estate is devised to pay debts, and the executor takes her ornaments and applies them to pay debts, she shall have a right to the amount against the estate so devised. So if they be so taken, where real estate is given in trust to pay debts. These English principles apply here, where not varied by our statutes; and as these have made the real estate of the deceased liable to pay his debts, a question arises if her *paraphernalia* are liable for them, while his personal and real estate is sufficient to pay them; as this real estate, so liable by statute, seems to be in the same situation as his real estate made liable by his will, for the same purpose, and as above, real estate so liable by devise, while sufficient to pay his debts, exempts her *paraphernalia* from being liable for the payment of them. 3 Atk. 370, 395; 3 P. W. 30; 1 P. W. 729, 730; 2 P. W. 544.

1 Mass. R.
841, Orrok v.
Orrok.
Reeve's D. R.
37.

The law appoints him her trustee where necessary; as if land be devised to her for her separate use, and no trustee ap-

CH. 19. pointed, the husband is trustee; so a bond so given. Toller's
 Art. 20. L. of Ex. 226, 228.

2 Dallas 199
 to 204,
 Barnes' les-
 see, v. Irving.

ART. 20. *Her appointment &c.* § 1. In Pennsylvania there is no court of chancery, and the question arose, what was a good appointment by a married woman. As where the intended husband, A. D. 1774, by deed executed with the intended wife, and a third person, covenanted, that her estate should be to their joint use during their marriage, and after that she "should have full power to dispose of it by deed or will, during coverture." They had no issue. January 29, 1790, during coverture, she made a will in the usual form, made the debts her executors, and gave them power to sell her real estate. They entered and sold it, and the sale was adjudged to be valid, and that this was a *good appointment* in the nature of a will, that her husband was barred, and so his heir, the plt., that the deed was like a covenant to stand seised to her use, and direction. The court in this case appeared to act on chancery principles, as there was no chancery in that state, and "so considered what ought to be done as actually done," according to the well known rule in chancery.

2 T. R. 684,
 Doe v. Sta-
 ples. See on
 this point, a.
 22, and Roll.
 Abr. 606,
 912.—1 Mod.
 157.—Ambl.
 665.—2 Dall.
 199.

§ 2. In this case the intended husband and wife before their marriage entered into an agreement in writing, but not under seal, so no deed, and stipulated that a settlement should be made of her estate, reserving to her a power to dispose of it; before the marriage she disposed of it to him by will, and he survived her, and devised the estate, and the devisee's title was held to be bad; for her marriage was a revocation of her will, as the marriage of every *feme sole* is, as a general rule, for by her marriage she totally gives up her control over her will, and the writing not being a deed did not continue in her a devising power during the marriage by the husband's consent; as might have been done by his deed.

2 Bl. Com.—
 Chris. Notes
 41, and 6
 Bro. P. C.
 156.

§ 3. The appointment of a married woman is effectual against the heir at law, though it depends only on an agreement of her husband before marriage, without any conveyance of the estate to trustees. This point has been decided by the House of Lords, though it is not recollected that there has been any adjudication upon this point, in this state. Several cases are recollected in which such agreements have been made, and the question as to their validity may soon arise.

2 Ves. 501.—
 2 Vern. 6.

§ 4. As a jointure comes in lieu of dower, it is not viewed in equity as a purchase by the husband of his wife's *choses*, but a competent settlement made before marriage is, and where they are purchased, her right of survivorship is forever gone. What is a purchase or not depends on the facts in the case.

§ 5. It is held by some, that she may devise her estate without the consent of her husband, where no legal right of his is to be affected by the common law, as far as others can devise thereby. By statute of H. 8, she cannot devise her lands.

Cx. 19
Art. 21.

ART. 21. *Several cases.* It is now settled his *donatio causa mortis* to her is valid.

Reeve's D.
R. 187, and
many cases.
4 Mass. R.
137, Hill &
ux. v. Davis.

§ 1. Hill and his wife brought a *qui tam* action against Davis and another, executors; and it was decided, that a man and his wife cannot recover in this popular action, sued in their joint names, for the wife can have no interest in the judgment jointly with her husband, nor is his interest therein in her right. This was an action against executors, for not causing a will to be proved.

§ 2. In this case the plt., while a *feme sole*, brought this action, and pending it intermarried. The deft. pleaded this matter in abatement. Judgment for him, that he recover his costs against her; and execution may go against her; the deft. may sue the judgment against her and her husband.

4 Mass. R.
650, Haines
v. Corlis Jr.

§ 3. In this case the evidence was, that for a long time the respondent had treated his wife in a very abusive manner, and about six years before the libel filed, had unjustifiably assaulted and beat her; after which the parties continued to live together, the respondent continuing to use the same abusive and threatening language. The court did not, for this reason of their continuing to live together, refuse a divorce *a mensâ et thoro* on the libel of the wife. Her powers in equity, 2 Ves. jr. 488; Anstr. 93.

6 Mass. R.
60, 60, Per-
kins v. Per-
kins.

§ 4. In this case the court said, that the husband and wife may join, or not, in an action, at their election, as where a bond is to both of them. Same on a covenant to them as to his estate, 2 Mod. 217.

1 Stra. 229,
Alebury v.
Walby.

§ 5. The deft. promised the wife to pay her £10, if she cured such a wound, which she did cure, and she and her husband sued for the £10, and the objection was, he ought to have sued alone, as it was a personal duty, that accrued during the coverture; but the court held, the action was well brought, being grounded on an express promise to her, and upon a matter rising upon her skill, "and such an action shall survive to the *feme*." This case has been questioned as to the right's surviving.

Cro. Jam. 77,
Brashford v.
Buckingham
& ux., in er-
ror, and 206.

§ 6. In this case the wife advanced monies to the deft. for certain considerations, which failed, and the husband and wife both brought *assumpsit* for the money, and it was objected the baron ought alone to have brought the action; but the court held, it was well brought, for his agreement made the promise

Cro. El. 61,
Prat & ux. v.
Taylor.—Am.
Proc. 24.—Ch.
9, a. 19.

CH. 19. good to him *ab initio*, and the promise being made to her, they may join in the action.

Art. 22.
2 Eq. Cases
Abr. 139.

§ 7. A bond given to husband and wife during the coverture, the right of the bond is in them both, and if the husband dies without any disagreement to her right in it, the bond shall survive to her, but the husband may disagree to her right to the bond, and bring an action on it in his own name.

7 Mass. R.
96.

§ 8. The husband's release of damages for abuse to his wife is valid, and a bar to his and her action.

§ 9. Though he may dissent to her *purchase* of real estate, that may make him tenant to his disadvantage, he cannot dissent to her estate by descent.

ART. 22. *Certain material principles resulting from the above and other cases.* § 1. The husband is sued with his wife for her debts contracted, and her torts committed *dum sola*, because she remains the debtor, and if not paid, she is liable if she survive him; or if she die first, her representative in the cases of contracts.

§ 2. Because by the marriage she loses all the means of payment, as he has her personal property in possession absolutely, the *usufruct* of her real estate during the marriage, a right to all her earnings, and to recover to his use her choses in action whenever he pleases.

§ 3. She can in no civil case be imprisoned but with him; because it would be most unreasonable to have her in prison alone, till she should pay, when the law has thus deprived her of the means of payment, and to remain till her husband should see fit to pay, who in some cases might never see fit to pay; but when he is imprisoned with her, he will pay the debt to gain his own liberty, and with it hers. Hence, if he escapes, she must be discharged after a reasonable time to re-take him, and if she be arrested, and he is not, she shall be discharged after a reasonable time to take him. And in order he be imprisoned with her, he must be sued with her for her debts and torts. For such both may be arrested. If he be bailed, she shall be discharged on common bail in England, and here where it is known; where not, she is discharged. If he be imprisoned she may be with him, except she finds substantial bail. So on execution.

3 Atk. 207,
417.

4. *When is she barred her survivorship?* The husband may clearly reduce, during the coverture, all her choses to his use, or he may assign them and bar her. But it is said to bar her surviving of a chose in action, his assignment of it must be for a valuable consideration; but *quære*, for why should he be held to receive to him a *quid pro quo* in disposing of a thing over which the law gives him an absolute power? And it is held, if he *voluntarily* assign the trust of a term that

3 P. W. 196.
—2 Vern.
407.—2 Ves.
675.

belongs to her, without consideration, she is barred of her right of survivorship; but if he voluntarily assign, and without consideration, her chose in action, or equitable interest, not the trust of a term, it does not bar her survivorship; but quære, as to the consideration. See 1 P. W. 378. He may assign a mere possibility in a chose in action, and her right of survivorship is barred. So her right and obligation of survivorship is forever gone, as to debts due to, and from her, by the bankruptcy of her husband, even if the coverture end before they be reduced to possession &c., and on the principle that his bankruptcy and the assignment &c. is a disposition in the eye of the law. Though she will be barred of her right of survivorship to her choses, by legal assignment made of them by her husband; yet many cases may exist, in which, in equity, he will be held liable to make provision for her. These cases are so numerous and complicated, and of so little use in the United States, that there is not room or reason here for stating them; but monies in the hands of her trustee, is as money collected in her hands, and not a chose in action.

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Art. 22.

Pr. in Ch.
419.—9 Mod.
106.

1 P. W. 249,
463.—3 Ves.
617, but
Salk. 281.—
9 Ves. 87.

§ 5. It is one of the marital rights, that the wife's chattels real survive to her husband absolutely, on her death, and this on the principles of the common law; whereas, her choses not collected, go to her executor or administrator in such case; nor are these chattels real in his hands so surviving, liable for his debts, and if he mortgage her term and survive her, the right of redemption is his, by the *jus accrescendi*, in those States wherein this and joint tenancy are allowed, according to some; but according to others, he cannot be joint tenant with her of her chattels real she has before marriage, as their titles do not commence at the same time, nor from the same act of the parties &c. He can make a lease of her chattels real, to commence even after his death for a valuable consideration, but he cannot devise them away by will.

Reeve's D.
R. 22.

1 Rol. 346.—
Hob. 8.—
Plow. 363.

§ 6. If a *feme sole* have a term for years, and is dispossessed of it and marries, her husband never has possession, and she dies, her administrator has it, as he has her choses in action; her possibility in such term does not vest in him, or survive to him.

Co. L. 351.—
1 Atk. 92.

§ 7. If the wife do not join with her husband in a mortgage of his estate, her dower is no way affected by it. If she joins, she has a right to redeem paying the debt. So where he mortgages his estate before the marriage, she has this right, and in both cases she pays one third, and his heir or devisee two thirds; and when she redeems, she holds the mortgaged premises till repaid the two thirds and interest, if more than the *usufruct* in the mean time. If her jointure be mortgaged,

Pre. in Chan.
157.—2 P.
W. 252.—
1 Cha. Ca.
27.—Reeve's
D. R. 52, 53,

CH. 19. she may abandon it and claim her dower, or she may redeem,
 Art. 22. and shall hold till the mortgage money is paid to her or her
 executor. In England the widow cannot be endowed of an
 equity of redemption, but there may be a tenancy by the cour-
 tesy of it, and so dower of it in Connecticut. And it is con-
 ceived there is both dower and courtesy of it in Massachu-
 setts, where the widow will pay a third of the debt; but the
 mortgagee's wife has no dower in the mortgaged premises,
 viewed as personal estate, except the mortgagee has title to
 get possession to enforce payment of his debt. If lands be de-
 vised for the payment of debts, she has dower after the debts
 are paid, but not of an estate in trust.

§ 8. *The wife's power to convey her estate.* How far she
 has a power to convey her estate is often a question. In Eng-
 land, there is no doubt but that she can do it by fine or recovery,
 because she is examined, if under the influence of her
 husband; but clearly nothing in these conveyances proves any
 defect of understanding in the contemplation of law, but they
 proceed on the principle she has a mind competent to convey;
 and the only question is, if she be unduly influenced by her
 husband; so it has been seen and admitted on all hands, she
 has discretion and capacity to convey any estate under a mere
 power given to her; so to contract when separated from her
 husband; so to be guardian, executor, or administrator. Where
 she cannot endorse a note made to herself. 1 East 432, Bar-
 low v. Bishop. And according to this case, Barlow v. Bishop,
 if A give a note to B's wife, intending it shall be her
 property, the property immediately vests in her husband, on
 the delivery of the note to her, though she is trading by her-
 self by his consent; and see 8 Ves. jr. 599.

And Mr. Hargrave, an eminent lawyer, is of opinion a wife
 may, without her husband, execute a naked authority, where
 given before or after marriage: so when lands are vested
 in her to convey, on a condition, she may convey, and his
 reason is, her husband cannot be prejudiced by her acts,
 and to require his consent would be often inconvenient.
 So if the legal title of land be in her, *as trustee*, she can con-
 vey it to the *cestui que trust*, without her husband. So by
 American law, in Massachusetts and Connecticut, if not in all
 the States, a wife by joining with him may clearly convey any
 estate she has; and he conveys only his own right, a life in-
 terest &c.; and she conveys her estate, the inheritance; this
 unquestionably implies she is of a capacity to do it; the max-
 im she has no existence during the coverture, and no will, has
 no foundation; for if so, she could not execute a naked power.
 By our law, she is bound by her conveyance, whenever she joins
 with her husband, and the only questions are, when may she

confirm or disaffirm a conveyance of her interest by him, without her ; or second, when can she convey alone ? If A lease to husband and wife, and he commits waste and dies, she confirms the lease by occupying the land when sole, and will be liable for his waste ; but not so if she waive the lease, as she may. When she joins not with him in conveying her land, so is not bound, yet after his death she may confirm his act, and be bound by it, by agreeing to it after his death, and will be entitled to the rent reserved ; but quære as to the arrears in his time ; and so she may agree to a lease made to him and her, and then be bound to pay the rent accruing *after* the coverture ended ; but a like quære as to that *during* it. She may agree to any conveyance made to them during the marriage, if she agree after his death, and is then liable to all charges, to which the estate is liable.

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By the custom of a London, a wife can convey her land by deed enrolled, but is examined by a magistrate, but clearly this examination does not give her the legal ability to do it, this the law must give, and the examination is only to ascertain if she acts freely.

Hob. 220,
231, Noodle's
case.

§ 9. *Her power to devise.* Some deny she, at common law, has a capacity to devise her estate, merely because she is a married woman. Others hold, she can, by that law, devise the property she possesses as well as any other person, if in so doing she infringes no rights of her husband. 1. On principle, a woman has a capacity to devise before marriage, and by it none contend her understanding is impaired, or her prudence diminished. Enough has been said in this Chapter, to shew the notion a wife has no will, is a mere fiction, almost without foundation in fact. She is, in no sense, an idiot, or *non compos* ; nor does the criminal law view her as one, in any case ; and we have seen already, in scores of cases, even the laws of property view her as able to convey or devise, and even alone, where her husband has no interest affected thereby, as where she executes a power as trustee, has separate property, and is separated by judicial sentence, or has a husband excluded her country. As to the coercion of her husband, it goes only to the practice and expediency, in certain cases, not to the principle ; coercion may, too, equally affect her conveyances by deed with him, yet this our law unquestionably allows ; why is he joined in this her conveyance, to be her guardian in it, surely not in the opinion of those who hold he will use his coercive power to her disadvantage ; the truth is, he is joined to convey *his own interest*, the law gives him in her estate ; a husband disposed to wrong his wife, may as well coerce her to convey with him her estate to his friend or appointee, who will convey it to him, as coerce her to de-

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wise to her disadvantage, or that of her heirs; and the wife who is firm enough not to convey but for her and their interest, will be firm enough not to devise but for her and their interest. She may be influenced to convey by deed when sick and weak, as well as to devise; but sick bed infirmities all are liable to. As to her examination in the case of a *finé*, or a recovery, on principle and in experience, it has been less than "a shadow of security;" the wife who has agreed to yield to her husband's influence, will always tell the court she is willing, and ages of experience have shown that this examination is of less worth than mere form. And why, by law, should she be obliged to let her estate descend to heirs, by no means the objects of her choice, for want of a power to devise? often heirs distant, remote, or other relations, who have invariably treated her ill, and unkindly, if not abusively.

Cro. Car.
219, 376,
Mariot v.
Kinsman.

2. *On authorities.* According to the weight of these, at common law, she can devise her property alone and without her husband, in which he has no interest whatever. She can clearly devise or bequeath her personal property by his consent.

Her husband bound himself to permit her to make a will, and give legacies, not above £50, and he would perform, and he married her. Plea, she did not make a will; replication, she did; and issue, and found she made a will, and gave legacies, not above £50, but was covert. Held, a good will in the nature of an appointment, and he was bound to perform it, though not strictly a will, being made by the wife, but a writing in the nature of a will. And some years after, there was à like case so decided.

Cro. Car.
376, Tulley
v. Pierce.

Bracton and Granville held a wife could not devise. Why? Because she could not dispose of her husband's goods, without his consent. But according to them, and other ancient writers, she could, with his consent. She could not bequeath, they said, but the reason they gave was, because she could not bequeath *his* goods; this implied she might *her own*.

Reeve's His.
111, 307.

Bracton stated, it was usual for her to devise her dress, and ornaments, properly, he said, her own property; that is, her *paraphernalia*, and without her husband's consent. She also had by her endowment *ad ostium ecclesie*, certain personal goods absolutely her own, in lieu of dower. He never could claim it, and she could devise it, because it was her own. So Bracton held. Archbishop Stafford held the same, that is, that married women had distinct property in some things, and these they could devise independently of their husbands. And the able civilian Lyndwood, held the same principle. As to real property, none could devise it before the statute of H. VIII, and besides that wives had very little property of their own; but if

3 Reeve's
His.—
4 Reeve's
His.—1 Ver.
253.—3 Atk.
709.—1 P. W.
126.—2 Ves.
76, 190, 610.

they could devise this little, their own, themselves, it settles the antient principles, and it seems they could ; and this statute of H. VIII, that authorized others to devise lands and real estate, forbid wives to do it. Their devises therefore must have been very rare, not for want of ability however to devise, but for want of property to be devised. Lord Hardwicke held this same doctrine, that a wife can devise her own separate personal estate. And so Lord Thurlow held, and the same, as a *feme sole*. Chancery never has had any power to dispense with the rule of property established by law ; and if by it a wife could not devise, chancery could not decide she could. If by the coverture the wife is disabled to devise by law, the husband cannot give her power to do it, further than *his* property is concerned, certainly not to devise her own. The books agree, that the wife may make a will of personal estate, she has in *auter droit*, as her husband can have no interest &c., and without her husband's consent ; and also her separate estate, as in *Crompton v. Collinson*, above ; in which estate her husband had renounced his interest, so that no marital right of his could be affected by her conveyance, in the nature of a deed or devise. As our ancestors, early after the settlement of our country, passed statutes relating to wills, the statute of H. VIII, on the subject, never was adopted here.

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2 And. 92.—
Moor 340.—
2 East 552.

In this case it was held, in a court of law, that a will made by a *feme covert*, disposing of her estate in legacies, and to charitable uses, was good and valid. See her power over her separate property, *Jarman v. Woolloton*.

2 Mod. 170,
173, *Brook v. Turner*.

§ 10. *Does her marriage revoke her will made before marriage?* Generally it does ; because generally the marriage makes some alterations in her property ; but not always does the marriage so revoke. The principle is this, as to whatever matter the wife becomes incapable of making a will by her marriage, it is a revocation of it, because the law will not hold a will valid, where there is no power to alter it, (except in the case of insanity ;) but whenever there is a power remaining in her, while covert, to alter her will or to make one, as in matters in *auter droit*, *paraphernalia* at common law, and separate property absolutely hers ; there the marriage does not, of itself, revoke her will, because if she wishes to alter it she can do it, and her not doing it shows she wishes it to stand ; and no injury can arise where there is this power. For instance, while sole a woman makes her will of things she has in *auter droit*, and marries ; and this will thereby is not revoked, because her husband by the marriage gains no kind of interest in these things, but they remain hers, in *auter droit*, as they were before the marriage ; and no hurt can accrue by holding this will valid, for no new rights accrue to make it unfit ;

Ch. 19. and if she after married dislikes it, she can revoke or alter it,
 Art. 22: as she pleases; and if she do not, it is evident her intention
 was, that it should remain in force as she made it. And so
 are the books.

Cro. El. 27,
 Eston v.
 Wood.—
 2 Vern. 536.

A *feme sole* made her will, and her intended husband covenanted to let it have effect, and she married. He pleaded her marriage as revoking her will. But held, in the Common Pleas, it was not revoked: though not properly a will to all intents, it had the effect of one, and the deft., the husband, had in his covenant called it a will.

Dougl. 708,
 Stone v.
 Forsyth.—
 3 Atk. 156.—

It is to be inferred from this case, that a *feme's* will made before, is not revoked by the marriage, where the baron has renounced his right and power over her property, affected by her will or appointment. *Ross v. Ewer*, 1 Burr. 431; 2 Br. Ch. R. 392.

Cowp. 260,
 269, *Darlington v. Feltie*
 ney.

And the same in this case, for wherever the wife's will is valid, it might be by law; that is, in every case the law of the land must give her the power to make one, her husband never can give it, all he can possibly do is to renounce his right and power to annul it; when he does not, and permits the will, as he ever must when it affects any of his rights, it is idle to say he makes the will in his wife's name, for where her property is separate, and her own absolutely, as the ancient indowment at the church-door, or her separate settlement, he has not the least power by law to make such a will and dispose of it. It is no more his will than the deed is his deed, in which she conveys her fee simple, and he his life estate; nor so much, for it is his deed *quoad* his life interest, though hers to every intent *quoad* the fee, and so are the books. It is proved as hers, not as his, and often she has made a valid testamentary instrument before he has seen it.

2 D. & E. 684.
 701, *Doe v.*
Staple.

In this case it was held, that *generally* a *feme's* marriage revokes her will made before; and this is true, but not always, as the word *generally*, so often used in these cases, clearly imports; and 3 Brown Ch. Ca. 337; 6 Bro. Par. Ca. 156; also, *Rex v. Bettesworth*, Stra. 891.

4 Co. 60,
Hembling's
Case.

This case proceeded on the ground, *generally* that a *feme's* marriage revoked her will, but not always; and the court stated the true principle, that is, that there must be a capacity to devise, not only at the making of the will, but at its consummation at death, except in cases of insanity, and then held, the wife loses this capacity by subjecting her will to her husband's, and thereby losing her freedom of action. But this cannot be when he renounces his control in particular cases, and as to her separate property; and this subjection clearly is not to be presumed, where it is specially provided against.

Now settled, where property is settled on the wife by

means of trustees or without, to her sole and separate use, or by any words, clearly expressing such intent, it is exclusively hers, and her husband has no control over it, but will be deemed to be her trustee of it, and it will not be liable for his debts. As where land was devised to a *feme covert* to her separate use, and no trustees appointed; held, her husband was trustee, and though he had become a bankrupt, the devised premises were not subject to the bankruptcy, as his interest therein was only that of one holding the property and legal title, as the trustee of another. So even if the baron gives his wife the estate for her separate use, it is valid. 1 Roll. R. 334; 3 Atk. 393; 2 Ver. 659.

Ca. 19.
Art. 22.

2 P. W. 316,
also 3 Atkins,
399, and
Bunb. 187,
206.—3 P. W.
144, 344.—
14 Ves. 642.
—6 East 552.

The wife cannot devise by her husband's consent her earnings after his death, but only property over which he has a disposing power; but alone can devise goods she has as executrix, his assent cannot give her a disposing power over goods she acquires after his death. If he once assents, he cannot after dissent. 2 Mod. 172, 173; Eq. Ca. Abr. 66.

Scammell v.
Wilkinson.—
Mod. 211, 212.
—Moor 340.
—Pr. Ch. 84.

§ 11. *What is her separate property.* To make property such the technical mode is, to grant, give, devise, or settle it to *her sole and separate use*; but these technical words are not essential, but any words which clearly express such to be the intention. Her separate property is liable for her contracts made during marriage, and may be taken by process in equity. And so in the States in which there are courts of chancery, and why not at law by process against that only, and not against her body, or even against that, where her imprisonment will in no manner affect her husband's marital rights.

On the wedding night the son's father gave diamonds to his wife. Held, *her separate property* and not *paraphernalia*. So a gift of ornaments to the wife by her husband or a stranger, has been deemed in the same point of view. So where A, the husband, bound himself to B to pay to him £100 for the use of A's wife, and he did not pay; held, B might compel the payment, and that B was trustee of the money for her use; we often practise on the principle of this case, as the trustee who sues and holds the money is wholly independent of the husband.

3 Atk. 393.

3 P. W. 334.

The wife granted an annuity out of her separate property for her husband's benefit. And held valid, and she was not allowed to plead she did it by his coercion, from fear of him who treated her harshly to get it. Chancery in this case must have proceeded on the ground, that she acted as a *feme sole* as to her separate property, and acted freely and without coercion, that is, chancery did not presume coercion, but doubtless if that was the fact, she would have been permitted to prove it, as any other person would be.

14 Ves. 442.

CH. 19.

Art. 22.



1 Atk. 269.—

1 P. W. 62.—

3 P. W. 241.

If a wife advances her separate property to relieve her husband's estate, and takes his receipt for it, this is no gift of it, but she is a creditor to the amount and in the place of the mortgagee, and must be paid by her husband's representative before he can have the estate; but if she take no receipt, and has no evidence it was an advance, it will be deemed her gift to him. So if he use her separate property, it is her gift to her husband, if no evidence presumed she meant it a credit. So if she advance her separate property for the support of the family, whether a gift, or a credit, will depend on the evidence of the fact, and such evidence as will prove a similar fact in any other case will prove it in this; usually, if she lend it to him on interest, it is a credit and debt due to her, and he is trustee. It is now clear, when the wife is put under no restraint as to her separate property, she can dispose of it as she pleases, independent of the trustees, and they must convey it according to her directions. They are not appointed to control her but for legal form, and to guard against her husband, and generally she can dispose of her separate property as a *feme sole* can, and also subject it to her debts and contracts in like manner, but not in either case so as to affect the rights of others; nor can the *feme sole* do this. She sues in chancery in the name of her trustees; if there be none, in the name of her husband and herself; if he refuse, in the name of, or by a *prochein ami*, and she having separate property may be sued as a *feme sole* in a court of equity.

1 Salk. 118.—
Money earned by the wife living separate, goes towards her maintenance.

As to her pauper settlement, see Poor, ch. 53; but it is the better opinion that articles of separation and separate maintenance do not exempt her husband from being obliged to maintain her on the pauper laws, for they cannot be repealed or varied by their agreements; but quære, if divorced from bed and board by sentence of court, as this is part of the law; but if a *vinculo*, she is no longer his wife.

How witnesses or not, as to each other, see Evidence, ch. 90, a. 7. As to the due celebration of marriage, and age of consent, see Marriage, ch. 46, and Divorces, ch. 46.

2 W. Bl. 1016.

Her separate maintenance payable quarterly, is to be apportioned at her death.

§ 12. *Contracts for separation.* It is now beyond all doubt that these, and for separate maintenance for the wife, are valid, not only in equity but in law, as before stated; and see 10 Vesey 191; 2 Vent. 217; 2 Atk. 511, 599; 2 East 282, *Rodney v. Chambers*. The trustee need not covenant to indemnify the husband against his wife's debts, in order to bind him. If no creditors, he is bound, and if creditors, the settlement will be enforced, she paying them. Lord Hardwicke held, a contract between husband and wife, without a trustee,

2 Atk. 511.—

3 Atk. 204,

205 to 297.—

Reeve's D. R.

213, 214, &c.

for a separate maintenance, was binding on him, and to be enforced in chancery in her suit against him; and his letter to her father, promising to pay her a sum of money, was a contract to her, and valid to this purpose; and in point of public policy it is as unexceptionable as a contract with the intervention of a trustee, a case doubted by none of late years. All these contracts are rendered void by fraud or concealment, practised on any party concerned. 1 Vern. 358, 475; 2 Ves. 275; 11 Ves. 165; 1 Bro. 543.

CH. 19.
Art. 22.

§ 13. *Her person, how liable to imprisonment or not in civil actions.* The husband in custody, before declaration she must be arrested, he to give bail for both.

1 Salk. 114.

Both rendered after judgment in discharge of bail, wife discharged on motion.

3 Wils. 124.

Both taken in execution in an action for her assault; both equally charged in trespass. *White v. Oldridge.*

1 Wils. 149.
1 Ld. Raym. 443.

The feme *dum sola* gave a warrant of attorney and married; leave given to enter up judgment against both, but 1 Salk. 399, it is said an after marriage revokes such a warrant. Salk. 117.

Loft. 320.—
4 D. & E. 362.
3 Bos. & P. 123.

In custody on *mesne process*, she shall be discharged on common bail, and this given by her husband.

2 W. Bl. 720.

On the feme's contracts, interlocutory judgment was had against her; she married; plt. got judgment and execution against her alone, and did not join her husband by *scire facias*. Execution by *capias* against her alone was well issued, (the plt. knew of the marriage) for it followed the judgment, and it was her own act to marry pending the suit.

4 East 521,
Cooper v.
Hunchin.

A wife sued alone, has no claim to be delivered out of custody on motion, unless it be shewn she *lives with her husband*, and openly. 2 W. Bl. 903.

Loft 396.

The wife *dum sola* gave her bond and married A, both outlawed, and her separate goods were taken in execution. Outlawry, as to her set aside, but not the execution. It was deemed proper her separate goods should be taken to pay her debt contracted *dum sola*.

2 Wils. 127,
Briscoe v.
Kennedy &
ux.

A wife discharged on common bail, sued for goods sold and delivered to her by the plt., then knowing she was a married woman, though living apart from her husband, with a separate maintenance.

7 East 582,
Wardell v.
Gooch.

§ 14. If the husband claim, in equity, the wife's fortune, by reason of his settlement made upon her before marriage, it must clearly appear in it he was intended as a purchaser of it to carry to his representatives, (he dying in her life time,) all her things in action, not reduced by him into possession; so of any part. 2 Ves. 675. And if he so acquires her portion she has at the time of the settlement, he does not acquire any

Pr. Ch. 63,
Cleland v.
Cleland.—
2 Vern. 503,
Garforth v.
Bradley—
Amb. 692.

CH. 20, future accession to it, unless expressly mentioned. 6 Ves. jr. Art. 1. 385, *Drew v. Dennison*; 9 Ves. jr. 87, *Mitford v. Mitford*.

§ 15. When land or stocks are devised, or conveyed, or transferred to the wife for her separate use, and no trustees interposed, her husband becomes her trustee by construction of law, and is accountable in chancery accordingly. And there is no difference where a trust is created by the act of the party, or by act of law. *Rolfe v. Budder*, Bunb. 187; 3 Atk. 399; 9 Ves. jr. 369, *Rich v. Cockell*; and equity will not only raise a trust, but will infer some gifts from the nature of them to be to her separate use, though not expressly so made, 3 Atk. 393, *Graham v. Londonderry*. But the intention must be clear, to destroy his marital rights in her property. 5 Ves. jr. 517, *Lumb v. Milnes*; do. 545, *Hartley v. Hurle*; 3 P. W. 355; Atk. 278; 3 Atk. 72, 270; 3 Br. Ch. R. 340; 2 Vern. 385.

CHAPTER XX.

ASSUMPSIT. BILLS, NOTES, AND NEGOTIABLE CONTRACTS.

As to evidence herein see Ch. 90, a. 10; as to variances between the writing and declaration, see Variance, index. As to evidence, see Evidence. Ch. 80 to Ch. 100.

ACTIONS of *assumpsit* grounded on *bills of exchange*, and other negotiable contracts have become very numerous in the United States, as well as in the British dominions, from an immense increase of trade and commerce within a century past. And law books and adjudged cases on these subject have still much more increased. Even as late as 1770, all the English law books then published upon the subject of commerce and negotiable contracts might have been read, and even studied in a few weeks by an English or an American lawyer. These in forty years since have probably increased tenfold, and are still rapidly increasing in bulk and value. To bring into view the laws at large on these important subjects would require thousands of pages; whereas only leading principles, illustrated by a few adjudged cases, can be here noticed, these briefly stated and selected from the best authorities. See *Chose in Action*, Ch. 24.

ART. 1. *General principles.* A bill of exchange is a written request, and a simple contract, made by one man on another, desiring him to pay monies to a third person, on the drawer's account, and is foreign, when drawn on a merchant abroad, and inland, when drawn on one in the kingdom or

2 Bl. Com. 466, 467.—Cunn. 294, 316.—12 Mod. 106. 1 Salk. 130.—1 Cranch 367.

government by a drawer there. A foreign bill was originally negotiable, and is an instrument of the law merchant. This law merchant is a part of the law of nations, in which a consideration is not material to make a contract valid, and is part of the common law of England and America. CH. 20.
Art. 1.

§ 2. By these English statutes of William the Third and Anne, inland bills are put on the same footing as foreign ones; "so that now in law, there is no manner of difference between them." 9 and 10 W.
III, Ch. 17.—
3 and 4 of
Anne, Ch. 9.

§ 3. No precise form of words is necessary to make a bill or note, and the bare drawing a bill makes the drawer a merchant as to that bill. 2 Bl. Com.
407.—
12 Mod. 30.

§ 4. The acceptor of a bill of exchange, when accepted, is the original debtor, and the drawer is liable only on his default. And when endorsed it is a new bill between the endorser and endorsee, and there is no difference between foreign and inland bills; and the endorsee may sue the endorser, though there be no demand upon, or even inquiry after the drawer, and declare accordingly. 2 Burr. 669,
678, Hylen v.
Adamson.—
2 Show 504.
—1 Salk. 133.
—2 Phil.
Evid. 12.

§ 5. But the maker of a note is as the acceptor of a bill, and there must be a demand on him, and notice thereof to the endorser before he can be resorted to by the holder: the maker is the real debtor. 9 Mass. R. 6.
—2 Bl. Com.
467.

§ 6. A promissory note is a direct and plain engagement in writing to pay monies specified, at the time therein limited, to a person therein named, or sometimes to his order, or to bearer at large. And by the 3d and 4th of Anne these money notes are made negotiable, assignable, and endorsible in like manner as inland bills of exchange are. Imp. 389.—
Kyd on Bills
30.

§ 7. Before a note is endorsed, it is wholly an instrument of *municipal* law, and a want of a consideration is a clear objection; but when it is endorsed, then it is as a bill by the statute, and is governed by the *law merchant*. It then begins to resemble a bill, the endorsement is the payee's order on the maker, his debtor by the note, to pay the contents to the endorsee. The maker by drawing the note has promised and accepted to pay; and he now stands in the situation of the acceptor of a bill, each is the original debtor, and in a bill or note endorsed a consideration is presumed. See above,
considera-
tion.—2 Burr.
676, Hylen v.
Adamson.—
Imp. 394,
407.—Chitty
182, 183, 256.
—Chitty 419.

§ 8. Notes and bills are always presumed to have been made on good consideration, unless the contrary be shewn by the deft., and the plt. need not aver or prove one. This point was settled A. D. 1785, in *White v. Sedwick*. So also an endorsement supposes a consideration. 1 W. Bl. 446,
Peckham v.
Wood.
Kyd 41.

§ 9. But in France, by an ordinance of March 1673, not only "value received" must be inserted in a bill, but its kind, whether money, merchandise, &c. Deft. may prove an illegal consideration, 1 W. Bl. 445. Kyd 31, 41,
Guichard v.
Roberts.

CH. 20.

Art. 2.

5 Mass. R.
209.—Chitty
263.
Mandeville v.
Welch, 5
Wheaton
277, 209.

§ 10. A negotiable note, given in consideration of a simple contract debt is a discharge of it. If several sign, and it begins, *I promise* &c. it is joint and several. Held, that bills of exchange, and promissory negotiable notes are distinguished from all other parol contracts, because *prima facie* evidence of valuable consideration, as between the original parties, and against third persons. 2 Where the owner of a *chose in action* assigns it, he cannot defeat the assignee's right in his suit to recover. 3. It is immaterial whether the assignment be good at law, or in equity only; this doctrine can apply only to all due on the contract assigned. The assignment and notice of it to the maker were specially replied to a plea of a release made by Welch, by whom this action was brought, for the use of A. Prior against Mandeville &c. maker. The *chose in action* assigned was a covenant.

6 Wheaton
102, Bussard
v. Levering.

§ 11. When the second day of grace falls on Saturday, it is the last day of grace, and notice to the drawer of a bill on that day, of non payment, after demand on the acceptor on that day, is sufficient. 2. *Post-office notice*. So it is sufficient notice to the drawer to put proper notice into the post-office, where the persons lived in different places.

6 Wheaton
104, Linden-
berger v.
Beall.

§ 12. The same rule as to the endorser of a note, as to last day of grace. So as to post-office notice, and it is not necessary to give notice to the debt. to produce the letter giving notice, before such evidence can be admitted.

Young v.
Bryan & al.
6 Wheaton
146, 672.
Nor is such a
protest evi-
dence of the
facts in it.

§ 13. No protest of a promissory note, or inland bill of exchange is necessary, and the endorsee of such note of one state, may sue the endorser of another, in the Federal courts, whether the endorser or drawee can sue the maker in them or not. The note was made by one citizen of Tennessee to another, and endorsed to Bryon & al. citizens of Pennsylvania. See Ch. 187, a. 7, s. 45. This action was viewed as being on the endorser's *new* contract to endorsee of another state.

Union Bank
v. Hyde,
6 Wheaton
672.

§ 14. If an endorser make a writing, and there is a question if thereby he waive notice, and demand, *parol* proof is admissible to shew, that it was the understanding of the parties, that the demand and notice required by law to charge the endorser should be dispensed with. Protest belongs to foreign mercantile transactions only; as to them it is indispensable to make the drawer of a bill, or endorser of a note liable. On foreign bills it is the evidence of demand, and has a binding effect.

2 Bl. Com.
467, 468.
Imp. M. P.
390.—
2 Show 236,
Grant v. Vaughan, cited 1 Cranch 296.—Chitty on Bills 386, 391, 392, 399, 403, 416, 439,
442.

ART. 2. *The property considered*. The payee of a bill or note has clearly a property vested in him, not in possession, but in action, by the *express* contract of the drawer, in case of

a note, and by his implied contract in case of a bill; to wit, that provided the drawee do not pay it, the drawer will, and this vested property when assigned, may be recovered by the assignee or endorsee in his own name. And if a note be payable to A or bearer, payment may be demanded by any bearer. It is the right or power in the endorsee or bearer, to sue the note or bill in his own name, and to his own use, that evidences the negotiability of the contract. Hence, it is only a money contract, that can be so sued, that is negotiable, or a contract to pay money alone; for one principal intent is, it pass as money from man to man, this it could not do if not payable in money.

CH. 20.

Art. 3.

ART. 3. *What is a negotiable contract.* § 1. These negotiable contracts, in many respects, serve the purposes of money, and differ but little from bank bills, payable to one or bearer, and they are made negotiable by certain English statutes adopted in many of the United States, expressly or in practice. See Ch. 24, Chose in Action.

8 Mod. 265,
267.—10 Mod.
294, 316.

§ 2. These statutes provide as follows :

First, that of William III. enacts, that "all and every bill, or bills of exchange, drawn in, or dated at and from any trading city or town, or other place in the kingdom of England &c., of the sum of £5 sterling or upwards, upon any person or persons, of or in London, or any other trading city, town, or any other place, (in which said bill or bills of exchange shall be acknowledged and expressed the said value to be received) and is, or shall be drawn, payable at a certain number of days, weeks, or months after date thereof, that from and after presentation and acceptance of the said bill or bills of exchange; (which acceptance shall be by the underwriting the same under the party's hand so accepting,) and after the expiration of three days after the said bill or bills shall become due, the party to whom the said bill or bills are made payable, his servant, agent, or assigns may and shall cause the same bill or bills to be protested by a notary public, and in default of such notary public, by any other substantial person of the city, town, or place in the presence of two or more credible witnesses; refusal or neglect being first made of due payment of the same, which protest shall be made or written under a fair copy of the said bill of exchange, in the words and form following :

9 & 10 Wm.
3, 17.

Know all men, that I, A. B. of the said — have demanded payment of the bill of which the above is a copy, which the said — did not pay, wherefore I, the said — do hereby protest the said bill.

Dated this — day of —."

By the second and third sections of this act, notice hereof

Ch. 20.

Art. 3.



**3 & 4 of
Anne.**

These sta-
tutes were
adopted in
Maryland,
&c. &c. but
not in Vir-
ginia.
1 Cranch
290, &c.

must be given in fourteen days, to the party from whom the bill was received, "who is, upon producing such protest, to repay the said bill or bills, together with all interest and charges," from the day of the protest; and if not so notified, the holder bears all losses &c. And if a bill be lost within the time for payment, then the drawer shall give another bill of the same contents to the person to whom so delivered; he giving security, if demanded, to indemnify &c.

By the statute of Anne it is recited, that money notes are not negotiable, so as that the assignee may sue in his own name, and enacted, "that all notes in writing, that after the first day of May 1705 shall be made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually entrusted by him, her, or them, to sign such promissory notes for him, her, or them, whereby such person or persons, body politic or corporate, his, her, or their servant or agent, as aforesaid, doth or shall promise to pay to any other person or persons, body politic or corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be by virtue thereof, due and payable to any such person or persons, body politic and corporate to whom the same is made payable; and also every such note payable to any person or persons, body politic or corporate, his, her, or their order shall be assignable and endorsible over in the same manner, as inland bills of exchange are or may be, according to the custom of merchants; and that the person or persons, body politic and corporate, to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same in such manner as he, she, or they might do upon any inland bill of exchange, made and drawn according to the custom of merchants, against the person or persons, body politic or corporate, who or whose servant or agent, as aforesaid, signed the same. And that any person or persons, body politic or corporate, to whom such note, that is payable to any person or persons, body politic or corporate, his, her, or their order, is endorsed or assigned, or the money therein mentioned, ordered to be paid by endorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person or persons, body politic or corporate, who or whose servant or agent, as aforesaid, signed such note, or against any of the persons that endorsed the same, in like manner as in cases of inland bills of exchange." And in every such action the plt. shall recover his damages and costs of suit, or if he fail, then the deft. his costs.

This statute of 3 & 4 of Anne further provides, that any

bill described in the 9 & 10 Wm. III, presented to a party on whom drawn, and refused to be accepted by underwriting the same, shall by the holder be "protested for non-acceptance, as in cases of foreign bills of exchange," "provided that no acceptance of any such inland bill of exchange shall be sufficient to charge any person whatever, unless the same be underwritten or endorsed in writing thereupon." And if not so accepted, no drawer shall be liable to pay costs, damages, or interest thereon, unless such protest be made for non-acceptance, and within fourteen days after such protest, the same be notified to him from whom the bill was received; and if such inland bill be accepted, and not paid in three days after due, then no drawer shall pay costs, damages, or interest thereon, unless protested and notified as aforesaid; but if either protest be made for non-acceptance, or non-payment, the drawer is made liable to costs, interest, and damages, or if notice be so given; but no protest is necessary, unless the bill be expressed to be for *value received*, unless the bill be for £20 or more, and the protest may be made by such persons as are designated by the said act of 9 & 10 of W. III.

CH. 20.

Art. 3.

And it is further enacted, that if any person accept such bill in satisfaction of any former debt due to him, the same shall be deemed full payment thereof, if he who accepts such bill for his debt, do not take his due course to obtain payment thereof, "by endeavouring to get the same accepted and paid, and make his protest as aforesaid, either for non-acceptance or non-payment thereof." "Provided that nothing herein contained shall extend to discharge any remedy, that any person may have against the drawer, acceptor, or endorser of such bill." It will be observed, that this statute recited that money notes were not so negotiable as that the assignee could sue in his own name, and then makes them negotiable. In the Appendix, 1 Cranch 367 to 461, many cases are collected, to shew, a money note payable to A or order, was, before the statute of Anne negotiable as an inland bill, and that as a foreign bill was. It is a question, if all these cases are sufficient to overturn the express authority of this statute, and the direct decision in *Clarke v. Martin*, 1 Cranch 408, 411, and in four other cases, not within the custom of merchants &c. See Post.

As these statutes are in general the foundation of negotiable paper in the United States, they are thus cited *verbatim* in their essential parts, and the substance of all the other parts taken.

Contracts, to be negotiable, must be for the payment of money, and rest on the *general credit* of the maker. It can answer their useful purpose only by making them a good demand against him any where, and payable in money, and ab-

Ch. 20. solutely. If only a demand on a particular fund, or payable in bulky articles, or on condition, their general use and circulation must be defeated. It is not necessary to express value

Art. 3. received in a bill of exchange; may be payable on condition to be void in a certain event.

4 Maule & S. 26.
1 Stra. 24,
Andrews v.
Franklin.—
Kyd 38.
§ 3. *What notes are good and negotiable.* A note payable "in two months after such a ship is paid off," is negotiable; for this is a thing of a public nature, and morally certain, and need not be physically so. It is enough the payment be certain in a moral sense.

2 Stra. 1217,
Cooke v.
Coleham.—
Willes 393.
§ 4. So to pay "in six weeks after the death of the deft's. father, for value received," is good; for the payment is certain, and only the time when, is uncertain. So is the case of all bills payable in so many days after sight, as it may be not certain when they will be presented. It is sufficient if payable in all events, though uncertain whether in a longer or shorter time.

1 Burr. 226,
Goss v. Nelson; see 7 M.
R. 240.
§ 5. So a note to an infant is valid and negotiable, "payable when he shall come of age, specifying the time, 12th of June, 1750." So to pay to A or order, on a day, or when he completes a building.

1 Wils. 262,
Evans v. Underwood.
§ 6. So a note to pay to A or order, £8, on paying off the wages of a public ship, is negotiable. See Edie's case, a. 5.

1 Stra. 264,
Poplewell v.
Wilson.—
1 Stra. 629,
Morris v. Lee.
§ 7. So a promise to pay £5 to B, for a debt due from C to B, is negotiable, for this is a sum to be paid in all events, and one man may, in writing, promise to pay another's debt. So to promise to account with T. T. or his order, for value received by me, is a negotiable promise. Same case, 8 Mod. 362; see Stevens v. Blunt, and 2 Ld. Raym. 1396.

Kyd 33.
—Mod.
296, 316.—
7 D. & E.
337.—
3 Caines 137.
1 Dall. 194.
§ 8. So a promise by the maker of a note to pay out of a particular fund, then in his power, is negotiable; for though this is named, there is an obligation generally on his personal credit to pay, the bare making the note being an acknowledgment he has money in his hands; he may be sued though this fund should fail; but a bill accepted on such a fund, its negotiability ceases. See Ch. 80, a. 4, s. 7.

Chitty 115.—
8 Johns. R.
485.
If part of a note be paid, it is negotiable for the residue, but not for a part of what is due, as the right of action cannot be divided. Several cases, Post. A made his note to B or order, and minuted on it, B was, as the consideration, to assign A a judgment against C; this is negotiable. But quære.

Cunn. 110.—
Kyd 36.—
5 T. R. 482,
487, Carlos v.
Fancourt.—
Chitty 37, 38.
§ 9. *The following notes are not negotiable, to wit:* One to pay £50, or render his body to prison; because the note is contingent; for if the body be rendered, the money will never become due; and not being negotiable when made, it cannot become so afterwards. One paid by the last endorser ceases to be negotiable. 3 Mass. R. 465.

§ 10. *So a promise to deliver a horse, and pay money;* CH. 20.
for it must be all money on a true construction of the statute, Art. 3.
and because if part of the payment could be in such an article as a horse, it would make the note's currency very inconvenient.

2 Stra. 1271,
Martin v.
Chaimtry.
Cunn. 114.—
Imp. 392.—
Chitty 261.

§ 11. So a promise to pay A £50, if B do not pay it in six weeks; for it is uncertain who is to pay. A bill of exchange, not to order, nor like words, is not so endorsible as the endorsee can sue. 1 Dallas 194.

§ 12. So to pay £10, if he do not render a prisoner by such a day; for there is no certainty the money will be paid. Kyd 36.

§ 13. So to pay 10 days after the debt shall marry; for it is uncertain if he will ever marry; and so if the money will ever become due. A promissory note is not negotiable at common law. 2 Ld. Raym. 775, 825; Salk. 129; 2 Ld. Raym. 757.

2 Stra. 1151,
Beardesly v.
Baldwin.

§ 14. So to pay on the death of A, provided he leave sufficient estate; for if he do not leave sufficient estate, the money will never become payable. Note not to order, is not negotiable. 2 Dallas 250.

1 Burr. 325,
Roberts v.
Peake.

§ 15. So to pay B or order, £300, in good East India bonds; for these bonds are not money. So to pay when a house is sold. 2 Bos. & P. 443.

Bul. N. P.
268, Moore v.
Vanlute.—
Chitty 260,
261.

§ 16. So a note payable in foreign bills, that is, bank bills of certain country banks, that passed at about two per cent. under par, is not negotiable; for it is not a cash note, or for money, within the meaning of the 3 & 4 of Anne, though never enacted in Massachusetts, yet "in practice, the provisions of the first section were early adopted." See Sanger v. Stimpson, a. 10. So a note to pay, provided a ship arrive at her port, free from capture and condemnation. 15 Mass. R. 387.

4 Mass. R.
245, Jones v.
Fales.—
1 Bay. 66.—
9 Johns. R.
120.

§ 17. So to pay out of the debt's monies that should arise from his reversion of £43, when sold. 2 Ld. Raym. 1361, 1563; 3 Wils. 207.

5 T. R. 482,
Carlos v.
Fancourt.

§ 18. So a promise to pay Herle £50 on demand, out of money in your hands, belonging to the owners of — mines, being part of the consideration for the manor of W. This is only a bare appointment to pay money out of a particular fund, and cannot answer the necessities or purposes of trade and commerce; see 1 Bos. & P. 398.

Stra. 691,
Jenny v.
Herle.—
Kyd 34.

§ 19. So to pay out of W's money as soon as you shall receive it. So an order to pay on the account of freight, when accepted to pay on such a particular fund, is not understood to be on the general credit of the acceptor, so that in all events he may be called upon to pay his acceptance.

3 Wils. 207.
—2 W. Bl.
782.—Stra.
1211.—
Doug. 571,
Pierson v.
Dunlap.

CH. 20.
Art. 5.

§ 20. A note to pay to the order of A, or to A or his order, is the same, and A may sue in both cases. 10 Mod. 286.

2 Mass. R.
424, Clark v.
King & al.
trustees.
3 Mass. R.
566, Blake v.
Sewall.—
Chitty 108.

§ 21. So a promissory note to bearer, payable in goods, is not a negotiable security, within the 12th section of the act of Feb. 28, 1795, respecting trustees; only the original promisee can sue it.

§ 22. A promissory note or bill of exchange, once paid, ceases to be negotiable, as where the note had been paid by the second endorser; but the person who makes the endorsement may be liable on his promise. If an endorser or drawer pay, he must sue a prior party, not one after the party paying.

1 W. Bl. 446.

ART. 4. *Notes &c. void by certain statutes.* § 1. Certain statutes here, as in England, as the statutes against usury, against gaming, &c. make all usurious notes and contracts, and all gaming notes and contracts, absolutely void, in whosoever hands they come. For particular cases, see Consideration, Usury, Gaming, &c.

Chitty 66,
Bowyer v.
Bampton.

§ 2. And where a note is made void by statute, as for usury &c., the consideration may, in every case, be enquired into, and the note is void even in the hands of an innocent endorsee, as against the maker, but the endorsee may sue the endorser. 2 Stra. 1155.

2 Burr. 1216;
same case,
1 W. Bl. 296.
—Kyd 61,
64.—Stra.
567—8 Wills.
1, 6, Rawlin-
son v. Stone.
—Stone v.
Rawlinson,
Willes 569.

ART. 5. *A contract once negotiable is always so;—by whom*

endorseable. § 1. Any note, or bill, or order, to pay money to one or his order, is negotiable in its nature, and if endorsed to one, he has the entire property of it; and though in the endorsement to him the words, "*or order*," are omitted, yet he may endorse it; for the endorsement, with such an omission, follows the nature of the original contract; and a blank endorsement may be filled up even at the trial. So a note, or bill, or order, may be endorsed by an executor or administrator, by the name of executor or administrator, but to pass the property only.

2 Stra. 260.
—Kyd 68.—
Strange 516,
Connor v.
Martin.

§ 2. So if a note or bill be made or endorsed to a *female* sole, and she marries, her husband may endorse it. For by the marriage he is entitled to all her personal estate; and he not only assigns the property of the note or bill, but he also, by a general endorsement, makes himself liable as endorser.

Kyd 68.—
1 Esp.—
Beaves 469.
—Cunn. 116.

§ 3. So the assignees of a bankrupt may endorse a bill or note, and to a married woman, clearly to pass the property, and they make themselves liable as endorsers, by a general endorsement. So as to Guardians &c., Ch. 85.

Kyd 69, Ev-
ans v. Cram-
lington.—
14 Mass. R.
279.

§ 4. If a note or bill be payable to A, to the use of B, A must endorse it; for B has only an equitable interest in it; and A must sue it, though he will recover the monies due on it to B's use. One is not liable, who endorses between other parties.

§ 5. The endorsement of a part of the debt is bad, unless the residue be paid; for the drawer, or acceptor, or endorser, cannot be subjected to several actions on the same contract. Salk. 69; 1 Ld. Raym. 360.

CH. 20.
Art. 6.

§ 6. So a bill or note, to two or more partners, may be endorsed by one of them, if it concern their joint trade.

Kyd 71.—
Carth 465 —
12 Mod. 213.
Kyd 68.
Dougl. 630,
653, Carvick
v. Vickery.

So if the bill or note be drawn in favour of two persons, or either of them, though not partners, either may endorse it. So where a bill drawn by two, is made payable to them or their order, either may negotiate it, for by so drawing the bill they hold themselves out to the world as partners. In this case the writing was, "Mr. Abraham Vickery, two months after date, please to pay to us or our order, the sum of, &c.

JOHN MAYDWELL.

JOHN MAYDWELL."

It was endorsed thus, "Jno. Maydwell." The Maydwells were father and son. The endorsement was by the son. They were admitted not to be partners. Deft. accepted the bill. Lord Mansfield non-suited the plt., because there was not an endorsement by both. But on consideration, the whole court was of opinion the endorsement, by one, was good, for "that the Maydwells by making the bill payable 'to our order,' had made themselves partners, as to this transaction." They being thus partners *quoad hoc*, it seems one could endorse it by signing his individual name.

If A, in one State, draws a bill on B, in another in the Union, it is an inland bill, to be endorsed &c. accordingly.

See Ch. 50 a.
1.

§ 7. So it seems, if I own a bill, and get A to endorse and sell it on my account, an action lies against me as an endorser; for what I do by him I do by myself. But it is to be understood that A exceeds not his authority in his endorsement of the bill. Where debt lies against the acceptor of a bill, and maker of a note, 2 Wheaton's R. 385.

3 T. R. 767;
& 4 T. R.
177, the case
of Finn & al.
v. Harrison.
—5 Com D.
85.—3 T. R.
176.

§ 8. After a bill has become due, one promises to pay it according to the tenor of it, this is a valid promise, and an action lies presently. This was a bill drawn March 25, 1696, and payable in a month. May 26th, 1697, the deft. accepted it, and promised to pay according to its tenor and effect. Verdict for the plt., for this was a promise to pay on demand.

12 Mod. 211,
Jackson v.
Pigot.

ART. 6. The effect of an endorsement, and how it may be restricted.

§ 1. If the payee &c. give an order to receive a note, bill, or order, to his use, he retains the property, and he may modify the order as he pleases; but if he sell it, and transfer the property by endorsement, it is doubtful if he can take away its negotiability, an essential quality given to it by the maker,

ry to his agreement he is liable in damages,

2 Burr. 1228,
in Edie v.
East India
Comp.—If an
endorsee use
an endorse-
ment contra-
Chipman 85.

CH. 20.
Art. 6.

2 Ld. Raym.
871.

Dougl. 637,
Ancher v.
Bank of Eng-
land.—1 Esp.
24.

2 Burr. 1006,
Moses v.
Macfarlan.

2 Johns. R.
60; special
endorsement
restored in
court which
had been
erased.—
15 Mass. R.
436, sum in a
note a penal-
ty 488.

12 Mod. 213,
Hawkins v.
Goodwin.

6 Mass. R.
225, Rice v.
Stearns. See
Blakely v.
Grant, a. 10.
So if only by
parol, Chip-
man 85.—
Chitty 113,
114.

3 Mass. R.
77, Powers
v. Lynch.

Cunn. 91, 92.
—12 Mod.
564.—

12 Mod. 192, 193, Clerk v. Pigot.—1 Salk. 130, 131.—Salk. 126, but 2 Johns. R. 300.

so as by any form of endorsement to render it not negotiable in the hands of the assignee; for he buys it for a valuable consideration, so with all its qualities and advantages, one of which is its negotiability. Endorsing the name merely, does not necessarily transfer the property.

§ 2. But in a later case it has been adjudged that such a note or bill is capable of being restrained by a special endorsement on it, and the restriction is by consent of the parties, who it seems may modify the contract as suits them, between themselves, and every subsequent endorsee must take it subject to such restriction. And if after thus restrained, the drawer pay it on a forged general endorsement, he may recover back the money.

§ 3. But the endorser may, or may not, be liable by special endorsement; for his endorsement being a new promise, he may modify it as he and the other party may agree.

Hence November 7, 1758, one Chapman Jacobs gave four promissory notes, for three of each, to Moses, for value received. He endorsed them to Macfarlan, with a special agreement that Moses should not be liable as endorser. However, Macfarlan, the endorsee, compelled Moses, as endorser, to pay the notes in a court of conscience, in which he could not avail himself of the special agreement. And Lord Mansfield and the court held, that Moses, the special endorser, must recover the money back from Macfarlan, the endorsee, in an action for money had and received, by reason of the special agreement. This Moses could not have done, if he could not by law have made such a restrictive endorsement.

§ 4. And if a bill be endorsed for a part of what is due, the endorsement is void; for if good, then the endorser would be liable to two actions.

§ 5. In this case the promisee of a note endorsed it specially thus, "for value received I order the contents of this note to be paid to Merrick Rice at his own risk." And in an action on this note by the endorsee against the maker, it was held, that the endorser was a good witness to prove the execution of the note; for by such special endorsement he was not liable as endorser, though this endorsement transferred the property of the note with its negotiable quality to the endorsee. So an endorsement may be restricted to a particular person only, or to a certain use. 7 Cranch 159.

§ 6. Held, that the endorser of a bill of exchange, drawn in a foreign country, and endorsed by one residing there, is only answerable according to the laws of that country.

§ 7. A by *parol* may authorize B to endorse A's bill, and to endorse his name on it, and when done, it is the same as if

A had done it himself. A bare endorsement does not change the property of the bill or note ; for it may be filled up with a receipt or assignment. It is only by filling up the blank endorsement the property is passed. CH. 20.
Art. 7.

ART. 7. *The form and effect of the acceptance of bills.* § 1. The holder of a bill or order, must request the drawee to accept it, and if he accept verbally or in writing, he is liable to pay it, but he must accept an inland bill in *writing* to subject him to the damages and costs, though otherwise as to the principal ; for a *parol* acceptance was good at common law, and the 3 & 4 of Anne does not invalidate the common law acceptance, but only requires an acceptance in writing to charge the drawer with damages and costs. 5 East 514 ; 4 East 57 ; 1 East 98. Sira. 648,
1162, Lum-
ley v. Pal-
mer.—Dougl.
299, Notes.—
Kyd 46.—
12 Mod. 346.

§ 2. A *parol* acceptance is good, and binds the acceptor. An acceptance may be before a bill issues, or after it is due, and so to pay part in money, and part in goods ; or to pay when certain goods shall arrive. So a conditional acceptance, as well as a *parol* one is good ; for the acceptor may vary the terms, and accept on new terms, but then the holder may consider this as no acceptance, or agree to it as he pleases. 2 Wils. 9.—
3 Burr. 1668.
—Dougl. 284.
—Kyd 60.—
Sira. 1162.—
2 Wils. 9, Ju-
lian v. Sho-
brook.

§ 3. Assumpsit on a bill, by the payee against the acceptor, who accepted, "on account of the ship *Thetis* when in cash for her cargo," the plt. avers he was so in cash when the bill became payable. This acceptance was adjudged good, and judgment for the plt. and held, that a *parol* acceptance is good. Though a bill or note be not negotiable, the endorsee may sue the endorser ; for endorsing is equivalent to drawing, and makes a new contract. 2 Sira. 817.
—2 L. Raym.
1642.—
2 Sira. 965.—
4 Maule &
Sel. 462.
Chitty 96, 96.

§ 4. An agreement to accept may amount to an acceptance. See Pillans & Rose, ante, Ch. 1, a. 1, 2, 3, 8, &c., but this agreement is still an agreement only, and if it be conditional, one must take it subject to the conditions ; and if not complied with the acceptance is void. Dougl. 299,
Mason v.
Hunt.—
5 Com. D.
80.—3 Mass.
R. 1, 13.—
4 East 57, 76.
Salk. 126,
129, Pinkney
v. Hall 127.
—Jackson v.
Pigot, 1 Ld.
Raym. 674,
and 364.
Sira. 214.—
5 Com. D. 80.
Kyd 48.—
2 Bl. Com.
468.—Dougl.
247, Ding-
well v. Dun-
ster.—Chitty
168, 169.

§ 5. If a bill be drawn on two joint partners, and is accepted by one of them for himself and partner, it binds both, if it concern their trade. But otherwise, if it concern the acceptor only. So an acceptance after the time of payment is elapsed is good, and amounts to a promise to pay the money.

§ 6. There may be a partial acceptance, or an acceptance for a part, or to pay at a later day, or for the honour of the drawer. The acceptance by the drawee is a contract on his part grounded on an acknowledgment, that the drawer has effects in his hands, or at least, credit sufficient to warrant the payment. And nothing but the express declaration of the holder will discharge the acceptor ; nor is a consideration essential to the validity of an acceptance, (which is tried by the

CH. 20. law of merchants,) for the honour of the drawer, Chitty 190,
 Art. 7. 191, or may be for the honour of the endorser, or of any particular one.

1 T. R. 182,
 Sproat v.
 Matthews.—
 Chitty 150.
 —4 East 73.
 —2 H. Bl.
 618.

§ 7. B abroad, drew a bill on A in London; he said he could not accept it, as he did not know whether the ship would arrive at London or Bristol. The holder left it for some time, reserving liberty to protest it for non-acceptance if A did not accept it. He again called, and A said the bill would be paid even if the ship was lost. Held, this was only a conditional acceptance, depending on the ship's arriving at London, or being lost. And whether the acceptance be conditional or an absolute one is a question of law, and Willes J. said, at present "almost any thing amounts to an acceptance," and if an acceptance be conditional, the holder waives it by noting the bill for non-acceptance.

1 Wils. 185,
 Simmonds v.
 Parmenter.
 —4 T. R.
 825, Mac-
 donald v.
 Bovington.—
 Stra. 733.

§ 8. Whenever the drawee accepts the bill, his undertaking is obligatory, and *assumpsit* lies against him without applying to any other party. And if the drawer pay the bill, he may sue the acceptor. So if the holder sues the acceptor, and takes him in execution, and he is discharged on the Lord's act; and then the drawer pays the bill to the holder, the drawer may sue the acceptor; so the action accrues to the drawer on payment of the bills. But an acceptor cannot be sued here, after he has been discharged abroad by the law of the place where he accepted the bill.

Kyd 47.

There was no remedy at common law for damages, interest, and costs against a drawer of an inland bill, but the said statutes were made to give a remedy against him for them in case of non-acceptance, or non-payment by the drawee. The statute of William made no provision in case of non-acceptance, and gave damages, interest, and costs, only where there was an acceptance in writing under the bill. The statute of Anne was made to extend the remedy to the case of non-acceptance, but the fifth section enacts, that no acceptance shall charge any person, unless underwritten or endorsed; and that if a bill be not so accepted, no drawer shall be liable to pay damages, interest, or costs on that account. And by the proviso at the end of the act, the common law acceptance is still good. Acceptance of a bill *primâ facie* proves effects.

3 D. & E.
 133.

Kyd 48, Pow-
 ell v. Mon-
 nier.
 Dougl. 28.—
 Kyd 52.

§ 9. And as a verbal acceptance is binding, there can be no doubt but that an acceptance by letter is so.

Stra. 1212.

§ 10. If I accept a bill absolutely in writing, but annex a verbal condition; this I must prove, and it can be of no avail in a dispute with a third person, holder of the bill, who was unacquainted with this parol condition. The acceptor of a bill cannot set up a forgery of it. 2 Stra. 949, Jenys v. Fowler, and 1054.

§ 11. "A conditional acceptance, when the conditions on which it depends are performed, becomes absolute." As if the drawee of a bill of exchange says, he cannot accept it till stores are paid for; it is an undertaking to accept *when* the stores are paid for. "But if the conditions, on which the agreement to accept a bill is made, be not complied with, that agreement will be discharged. As if a merchant agree to accept a bill to a certain amount, on condition a cargo of equal value be consigned to him, and an order given for insurance. If the cargo consigned be not of equal value, he is not bound to accept. A promise to accept a bill to be drawn is not negotiable. Chitty on Bills 139. See s. 18, below.

CH. 20.
Art. 7.

Cow. 671,
Pierson v.
Dunlap.—
Kyd 52, 53.
—Chitty 139.
—2 East 325,
Mason v.
Hunt.—
Dougl. 297.
—1 East 106.
—4 East 70.

§ 12. A small matter often amounts to an acceptance; as if one say, "leave the bill with me, and to-morrow I will accept it;" this is an acceptance. But if he say, "leave the bill with me, and I will look over my books and accounts between the drawer and me; call to-morrow, and accordingly the bill shall be accepted;" this is no complete acceptance, for it depends on the state of the accounts. Acceptance by letter previously.

Chitty 140.
Kyd 53.—
Brewes 455.
3 Burr. 1674.

§ 13. Any thing written on the bill, by the drawee, as "presented," "seen" &c. may be explained to be an acceptance by other circumstances. So if he direct one to pay the bill; and the drawee's common manner of doing business in this respect may be proved to aid the explanation.

Kyd 53, 54.
Powell v.
Monnier,
1 Atk. 787.

§ 14. The drawee is asked to accept, and draw on a third person; barely so drawing is not an acceptance, he shews he means to be liable only if his bill is accepted and paid by the third person.

1 T. R. 269,
Smith v. Nissen.

§ 15. An agreement verbal or written, to honour a bill, will often be an acceptance. As where one White, a merchant, in Ireland, desired to draw on Pillans & Rose, merchants at Rotterdam, for £800, payable to Clifford, and proposed to give them credit on a house in London, for their reimbursement, or any other method of reimbursement. Pillans & Rose desired a confirmed credit upon a house of rank in London, as a condition of their accepting the bill. White named the defts.; thereupon Pillans & Rose honoured the draught, and paid the money, then wrote to the defts., Van Merop & Hopkins in London, (to whom White also wrote about that time) to know if they would accept such bills as Pillans & Rose in about a month should draw on the defts., for £800 on White's credit. The defts. assented; and the plts. drew on the defts. accordingly; before their bills reached the defts. or were even drawn, White failed; thereon the defts. notified the plts. not to draw; but they did draw, and the defts. refused their bill. This was held to be an acceptance, hence it was an acceptance of bills before they were drawn, and by letter.

Pillans & al.
v. Van Merop & al.—
3 Burr. 1663.
—Kyd 54 to 57. The same case.
A like case,
2 Wheat. R. 66, Coolidge & al. v. Payson & al. cites 3 Burr. 1663.—
Cowp. 671.—
Dougl. 296.—
1 East 98.—
4 East 57.

CH. 20. Lord Mansfield delivered his opinion and said, (among other things) "the law of merchants, and the law of the land is the same." "A witness cannot be admitted to prove the law of merchants." "A *nudum pactum* does not exist in the

Many cases as to the law of Merchants 366 to 461.—
Chitty 128, 148.

usage and law of merchants." "In commercial cases among merchants, the want of consideration is not an objection." The defts. engaged to accept the bill, this was in effect accepting it; "and they could not afterwards retract," the judges agreed.

3 Mass. R. 274, Josselyn v. Ames.—
Chitty 96.

§ 16. If a note not negotiable be endorsed to A for a valuable consideration, he may write over the endorser's name a promise to pay the contents of the note to the endorsee, who may sue the endorser on that promise—note was for money, but not to order, and endorsed in blank. Court held, the promisee might endorse blank, and endorsee write over his name, "for value received, I undertake to pay the money within mentioned to Elisha Josselyn," and that he might maintain an action on such endorsement.

Chitty 166, 200.—2 H. Bl. 609.

§ 17. If a bill be accepted by mistake, the acceptance may be deleted, but it is a question if it can be, if not accepted by mistake.

When a bill is made payable at a particular place it must be there presented therefor, and at business hours, or otherwise to him, or at the house of him on whom it is drawn.

§ 18. As to accepting a bill before, or after drawn, the law seems to be settled, 2 Wheaton 66, 76, Coolidge & al. v. Payson & al. A. D. 1817. The principle adopted was this, a letter written in a reasonable time before or after the date of a bill, well describing it, and promising to accept it, is, if shewn to the person who afterwards takes it on the credit of the letter, binding on the person making the promise, cited as a. 15. But in this case it seems to be the court's opinion, that if A by letter asks B, if he will accept a bill to be drawn, and B by letter to A says, he will accept it, and no one takes the bill on the credit of B's letter, this is no acceptance. In this case no third person is affected by B's letter; and perhaps another reason exists; so far, the case remains solely between A and B, the original parties, as between whom, the consideration and all the circumstances may be inquired into; as yet the case has not assumed the form of negotiation or an assignable form.

§ 19. The Supreme Court of New York has finally decided in favour of a third party's taking the bill on the faith of a written engagement to accept. Goodrich & al. v. Gordon, 15 Johns. R. 6. So in Maryland, 1 Hall's L. J. 486.

§ 20. Though an acceptance be in writing, yet *parol* evidence is admissible to shew there was a condition annexed to it, see Ch. 90, a. 10, s. 23. The acceptor is liable, though he

receive no consideration, and the endorsee knows it. 1 Taun. 224.

CH. 20.
Art. 8.

§ 21. *Effect of acceptance by one partner*; it binds all, except the rest notify the plt. to the contrary; but if the drawees are several persons, each must accept. The acceptance admits the drawer's ability to make the bill; hence, no objection he is a minor. If made after seeing the bill, it admits the drawer's signature also, and the acceptor is liable, though the bill be forged. 2 Phil. Evid. 23, 24, 25; Bayley on Bills 217, 219, Robinson v. Yarrow; 7 Taunt. 455, Wilkinson v. Lutwidge; 1 Stra. 648, 649; see s. 10; 6 Mass. R. 187; 1 Bin. 36; 6 Taunt. 83; 4 Maule & Sel. 13, Bass v. Clive, and s. 15. Acceptance does not admit the endorsement, Ch. 20, a. 21, s. 31, 36. Acceptance *prima facie* proves effects, 2 Phil. Evid. 32.

ART. 8. *Bills, &c. payable to bearer &c. lost &c.* See art. 14.

§ 1. October 22, 1763, the deft. drew a bill on Asgill & Co. for £70, payable to ship Fortune or bearer. This being lost it was found by an unknown person; who, October 25, paid it to the plt. for a parcel of teas. He took it on finding the drawer was a responsible person. The plt. sued Vaughan and obtained judgment. Against the action were cited sundry cases, as Horton v. Coggs, 3 Lev. 299; Hodges v. Steward, Salk. 125; Morris v. Lee, Ld. Raym. 1397; Clerk v. Martin, Ld. Raym. 758, and Nicholson v. Sedgwick 180. These cases not law now.

1 W. Bl. 486,
Grant v.
Vaughan.—
2 Show. 236,
Henton's
case.—
12 Mod. 241,
Newman's
case.—Chitty
95.

But Lord Mansfield and the court clearly held, that a bill payable to one or bearer is negotiable, and is on the same footing as a common bill of exchange. The court denied the old cases; the court further held, that a bill payable to A or bearer, is intended to be transferred in the easiest manner, even without endorsement; but the bearer to support his action must shew he came by it *bona fide*, and for a valuable consideration; the point being thus settled after a variety of decisions, as in the above cases, as also in the cases of Salk. vol. 3, p. 67; Salk. 133, and Newman's case, 12 Mod. 241 to the contrary. These cases to the contrary need not now be examined; the law in them being clearly mistaken. By the old cases, one endorsing such a bill was liable. If payee endorse a note to bearer, he may be sued as endorser. Chitty 109.

If the payee
of a note,
payable to
him or bear-
er, puts his
name on the
back, he may
be sued as
endorser.—
3 Johns. R.
430, Brush v.
Reeves.—
Salk. 125.—
5 Com. D.
84.

§ 2. And all our bank bills are in the form, to one or bearer, and it is every day's practice for the bearer or possessor to call on, or sue the bank that issued them.

On a note to A or bearer, it is sufficient to state the plt. is the bearer. If a note or writing be blank as to the contractee, the bearer must shew his right to it; as one thus, "Boston,

12 Mod. 241,
and Chitty
17.—1 Johns.
R. 143.—
4 Mass. R.
451, Dole v.
Weeks.

CH. 20. 15th May 1810, good for \$120 on demand, Gilman & Hoyt ;
 Art. 9. the bearer must shew it was actually given to him, or some
 ~~~~~ subsisting connexion whence that fact may be inferred. 13  
 Mass. R. 158, 161, *Brown v. Gilman*.

CONN. 56, 92, ART. 9. *When the drawer of a bill may be sued or not.*  
 116, 60, 91, § 1. His promise is conditional, to pay, if the drawee do not.  
 408.—2 STRA. A demand must be made on the acceptor of a bill, before the  
 1246.—2 W. drawer can be sued. So on the maker of a note, before the  
 BL. 747.— drawer can be sued. But if he pay part, he dispenses with a  
 STRA. 745.— demand. And if an endorsee of a bill accept but two pence of  
 IMP. 409.— the acceptor, he can never resort to the drawer." So if the  
 STRA. 792. *Gee* endorsee give any time to the acceptor. As to the above rule,  
*v. Brown*.— that if the endorsee receive part of the acceptor, he cannot  
 1 WILS. 48.— resort to the drawer, when it must be for his advantage, the  
 1 DOUGL. 250, acceptor pay a part, the law now may be considered as being  
*Ellis v. Ga-* otherwise. And Chitty says, "it is now settled that the hold-  
*lindo*.—Chit- er may receive part payment from the acceptor or en-  
 ty on bills, dorsor, and may sue the other parties for the residue, provid-  
 214, *James v.* ed he do not also give time to the acceptor &c., for the pay-  
*Badger, &* ment of such residue." Same law as to the endorsee and en-  
 231.—DOUGL. dorsor of a note, and may sue the acceptor for such part &c.  
 250.

DOUGL. 54,  
 Milford v.  
 Mayor.

KYD 70.—  
 3 East 481,  
*Ballingalls v.*  
*Gloster*.—  
 2 H. BL. 378.  
 —Chitty 183,  
 361.

3 Mass. R.  
 557, *Watson*  
 & al. v. *Lo-*  
*ring & al.*

2 Johns. Ca.  
 75.

2 H. BL. 378,  
 Mellish v.  
*Simeon*, post  
 a, 20.

§ 2. Buller, J. said, that "it is settled, that if a bill of exchange is not accepted, an action on the bill will lie immediately against the drawer, although the time of payment is not come." And so also against endorsers, Chitty 183, 341 ; and then their promise is stated to be on request, 1 Day's Ca. 11.

§ 3. So an action lies by the endorsee against the endorser, on a bill, immediately on non-acceptance of the drawee, though the time for which the bill was drawn be not elapsed. And it was held, there was no distinguishing the case of an endorser from that of a drawer ; "every endorser is in the nature of a new drawer," so liable on request.

§ 4. And in this case in Massachusetts, the same principle was recognised, in which it was decided, that if a bill be protested for non-acceptance, the holder may presently sue the drawer and endorser, though the time of payment named in the bill be not come. 4 Johns. R. 144.

§ 5. But only the maker of a note, and the acceptor of a bill, is an absolute promisor. The drawer of the bill, and endorser of the note, subject themselves with this limitation, if the bill or note be not paid when due, by the acceptor and maker respectively, the holder shall have his action against any of the conditional promisors, provided such holder give notice thereof in convenient time. It is therefore material to consider this notice, and regular protests.

§ 6. If A, in England, draw a bill on B, in France, and after it is negotiated through Holland, B refuses to accept it, or

pay it, because prohibited by a French law, A, the drawer, is liable for the whole amount of the re-exchange between the different countries. See post. CH. 20.  
Art. 10.

§ 7. The endorsee may recover the whole bill against the drawer, though the endorser of the bill has paid him a part; he is no agent or servant to the drawer. This may be true; but what right has the endorsee to receive more than the amount of the bill? And held, if the endorsee recover part of the drawer, he can only recover the residue of the acceptor; and where the drawer pays the whole, the acceptor is discharged, and the bill ceases to be negotiable. 2 Wils. 262,  
Johnson v.  
Kinsman, or  
Kennion.—  
1H. Bl. 88, Ba-  
con v Searles.  
—Beck v.  
Robley,  
1 Bos. & P.  
152.

ART. 10. *Protests and reasonable notice.* § 1. These are a very essential part of the transactions respecting negotiable contracts. Notice is very material. Protests are more matter of form. As to notice, when A makes a note to B, he thereby becomes B's debtor to the amount of the note, and so to any one holding and owning the note. When the holder endorses it, he, in fact, draws an order on this debt, directs and expects A to pay it to the endorsee; this too is his expectation; but the endorser agrees to pay it, if A do not. But the endorser very justly makes this condition, "A owes the debt to me, if he do not pay it to you, the endorsee, I will pay it to you; but then I must have from you timely notice of his failure to pay, that if I must pay, I may immediately attach his property, to secure the debt he will owe me." So when one draws a bill.

Kyd 150 &c.  
—Chitty  
174, 175.—1  
T. R. 169.—  
2 Wils. 353.  
—1 Maule &  
Sel. R. 545,  
556.

§ 2. The same, nearly, is the reasoning of the drawer of the bill. It is *prima facie* presumed he gives an order on his property in the drawee's hands; and if the drawer must pay the bill, he ought to have this timely notice to secure his effects in the drawee's hands. If none be in them, which may be proved, then the reason fails, and he is not entitled to this notice. 3 Bos. & P.  
242.—1 T. R.  
406, Bicker-  
dike & al., as-  
signees, v.  
Ballman.

§ 3. If the drawee refuse to accept, clear it is, this notice ought immediately to be given to the drawer. So if the drawee accept the bill, and then refuse to pay it, this notice ought to be given to the drawer, except he have no effects in the drawee's hands; but future consignments expected &c., may be effects in drawee's hands; and if no effects, drawer may prove real damages sustained by him. 2 Morg. Ess.  
197 — Chitty  
164, 166, 167,  
168, 166.—  
7 East 350.—  
4 Maule &  
Sel. 226.

This was an action of the endorsee against the endorser, on notes lodged in a bank in Boston, for collection, where the deft. did business. Notice was given to make the *first* day of grace, but the note was not carried to him. Notice was 4 Mass. R.  
245, Jones v.  
Fales.  
See Sanger's  
case post.  
Wherever a  
the contract

drawer exists the demand of payment & notice is an implied condition of the contract or endorsement, if endorsed before or after due.—9 Johns. R. 121, Berry v. Robinson.

CH. 20  
Art. 10.



12 Johns. R.  
424.—1 Phil.  
Evid. 17.—  
1 Dallas 193.

12 Mod. 345.  
—S. C. of U.  
S. 3 Dallas  
368, 424,  
Brown in er-  
ror v. Berry.  
1 T. R. 167.  
—2 do. 713.  
—3 Bac. 613.  
—Bul. N. P.  
270.—5 Burr.  
2671.—  
8 Mod. 81.—  
1 Salk. 131.  
4 Mass. R.  
370, Ayer v.  
Hutchin.—  
1 Mass. Rep.  
1, 7, Gold v.  
Eddie.—  
18 Caine's R.  
27.—1 Johns.  
Ca. 331.—  
2 Caines' Ca.  
in E. 308.  
—2 Johns. R.  
300.—13 East  
498.

2 Bl. Com.  
496.—1 Salk.  
127, Allen v.  
Dockwra.

given to the endorser the *last* day of grace. And held to be sufficient, this being the practice of the bank, to which the deft. submitted; and though this note for foreign bills, as above, was not negotiable, yet the endorsee recovered against the endorser; for, said the court, by our practice the plt. may declare as if the note were negotiable, that is, as between the endorsee and his immediate endorser upon his contract. And also in this action the court held, that a promissory note is not entitled to grace, by the laws of this State, unless made payable with grace. Time of grace is three days, "unless the last day be not a day of business, and then it is two days." Notice is for the endorser's advantage, which he may waive or dispense with. And it was said, when the deft. agreed his notes should be lodged in the bank for collection, he agreed to the practice of it in giving notice. A protest for non-payment must be under a *notarial seal*; but for non-acceptance, the fact may be established by other evidence. 13 Mass. R. 131, Bishop v. Dexter; 2 Connecticut R. 419; 12 East 171, 177, Legge v. Thorpe.

§ 4. In an action on a bill of exchange, protested for non-payment, the plt. need not aver, nor produce a protest for non-acceptance. This is clearly correct law. For one protest is sufficient to ground the action, though if the drawee refused to accept, this was a material fact of which the drawer was lawfully entitled to notice, and if made an objection, should be proved; though authorities, that one protest, in such a case, is sufficient are many and clear, though the law on this point was not so in more antient times. Kyd 137, 140, 151.

§ 5. *Endorsed after due.* It is a clear principle of law, that if the endorsee of a promissory note receives it under suspicious circumstances, as if after payment has been refused, or sometime after it is made payable, or if the endorser is not to be liable on his endorsement, the endorsee takes it subject to any legal defence to which it would have been subject, if sued by the promisee; for in these cases the endorsee ought to enquire into the validity of the note. "A note payable on demand is due presently." In this case the endorser did not make himself liable as endorser, and the note was endorsed eight months after it became due. And if a note be endorsed in trust, any evidence may be admitted against the trustee, which might have been admitted against the *cestui que trust*. The yellow fever in New York an excuse for not giving notice &c. 2 Johns. Ca. 1.

§ 6. *What is timely or convenient notice.* When a bill is refused payment, it must be demanded of the drawer as soon as conveniently may be, otherwise the law will imply that it is paid; there is a trust between the parties, and it may be prejudicial

to trade, if a bill may start up at any time to charge the drawer, when, in the mean time, all accounts may be settled between him and the drawee. In this case in *Salkeld, Sutor*, the drawee failed, and Allen, the holder, kept the bill four years.

CH. 20.

Art. 10.



§ 7. In this action the court decided, that if the maker of a promissory note, assign all his property to the endorser for his security against his endorsements, the endorser is considered as waiving a demand on the maker, as well as notice to himself as endorser, for he must know that such a demand or notice is fruitless, "as he had secured all the property the maker had;" and as "he must be considered as having waived the condition of his liability, and as having engaged with the maker, on receiving all his property, to take up his notes," and the endorser offered to pay in foreign bills.

5 Mass. R. 170, *Bond v. Farnham*, a. 20, s. 7; but see 11 Johns. R. 180.

Art. 21.

§ 8. And the rule is the same, as to any particular note, if the endorser receive of the makers security to meet it.

When the maker of the note is insolvent at the time of making it, it is said no notice is necessary, as the want of it can be no prejudice. Here the endorser gave no consideration for the note and received none.

2 H. Bl. 336. Art. 20.

§ 9. In this case Ham, of Portsmouth N. H., drew a bill February 20, 1804, for £500 on Dickerson & Co., London, payable to the deft. or his order, at sixty days' sight. He endorsed it to the plt. It was not accepted for want of effects, and protested for non-acceptance; and protested for non-payment. August 18, 1804, the plt. received notice of the protest for non-acceptance; and September 3, 1804, the plt's. agent called on the deft. for payment, and only shewed him the protest for non-payment; this was the deft's. first notice &c.; but he said, in a few days he would look round, and prepare to settle it. September 7, 1804, having consulted counsel he refused to pay it, for want of due notice of the protest for non-acceptance. Ham, the drawer, stopped payment Feb. 27, 1804, or in eight or ten days after. April 14, he left Portsmouth, and had not returned. June 10, 1804, his household furniture was attached, and afterwards sold on execution; his farm and stock were attached March 2, 1804, and execution was afterwards levied on them.

4 Mass. R. 341, *May v. Coffin*; see the last part of this article.

Judgment for the deft. for want of due notice. And held, that Ham's failing &c., as above, was no excuse for not giving notice as between endorsee and endorser. That in every case the endorser must have notice. That it was forcibly urged that the deft. did not sustain any loss or damage for want of notice; and that he waived any objection on this score by proposing to pay, but the court said there was no considera-

CH. 20. tion for this,\* and that in every case due notice was to be given  
Art. 10. to the endorser.

Mass. S. J.  
Court, June  
1798, at York,  
Livermore v.  
West.

§ 10. In this case one Emery made his note to West, payable March 6, 1797. West endorsed it to the plt. Emery neglected to pay about two months, and after this, and while he was solvent, the plt. called on West to pay. The court held, West the endorser was liable. For, said the court, it is sufficient if the endorser have notice and time to secure himself, by attaching the maker's goods before he fails. This decision in this case, was given not on the examination of many authorities, and is clearly contrary to that in *May v. Coffin*, which was made on great deliberation.

6 Barr. 2670,  
Blesard v.  
Hirst & al.

§ 11. March 8, 1769, one Topham drew his bill on one Klotz for £30, payable six weeks after date to the defts. or order. They endorsed it to the plt. March 21, 1769, he had it presented for acceptance, and Klotz refused it. April 2d, the day it became due, it was presented for payment, and protested for non-payment. April 11, 1769, the drawer, Topham, failed. The plt. gave no notice of the refusal to accept, but April 29 gave notice to the defts. of Klotz's refusal to pay. May 2d, one of the defts. promised the plt. to pay the bill. Verdict for the plt. : and a new trial was granted.

1st. Because the plt., the holder of the bill, had neglected to give the defts., the endorsers, due notice of the drawer's refusal to accept the bill, though perhaps there was no need to present it for acceptance before the day of payment; but when done, the holder should have given notice of non-acceptance.

2d. Because the promise made May 2d, to pay the bill, was made under a mistake of the case.

10 Mass. R.  
1, 8, Lenox  
v. Leverett,  
admx.

§ 12. *Assumpsit* on two bills of exchange by the endorsee. The first endorser was the deft's. intestate. Jan. 9, 1809, Robert Fields drew the bills on Frederick Dawson, London, payable in 60 days after sight, to William Leverett, said intestate, or order, January 19, 1809, sold to the plt. in New York, through the agency of a Mr. Willard of Boston, who sent them to the plt., endorsed by the intestate. January 27, 1809, the plt. remitted them to his correspondents in London, who received them March 25, and on that and the next day diligent search was made for Dawson, and no intelligence of him could be obtained, but found no such person as Fred. Dawson had been at Mile-End-Road. April 1, 1809, were noted by a notary for non-acceptance; but no regular evidence of a protest therefor. On or before April 5, Murdock & Co. offered to pay the bills at maturity for the honour of the plt. This information the plt. received June 9, 1809, and it was given to the intestate immediately. June 3, 1809, the

\* But contra, *Billbee v. Lumley*.—See also 2 East 471.—Chitty 187.

bills were duly protested for non-payment, and paid by Murdock & Co. June 19, 1809, they informed the plt. of this, and forwarded the bills and protest. Of these facts the intestate was immediately informed &c. &c. The court held, 1st. This payment for the plt's. honour "did not vary the duties of the holder; he was still bound to cause them to be protested for non-acceptance, and at their maturity, to cause them to be duly protested for non-payment by the drawee." 2d. The holder was "obliged to give the same notice to the antecedent parties to the bills, as if they had not been taken up." 3d. No legal evidence of a protest for non-acceptance, this need not be sent at the time, but the holder must give notice of the fact to such prior parties as he intends to resort to." 4th. When he sues for non-payment, both protests must be produced. 5th. Here was an inexcusable delay as to the protest for non-acceptance, (non-payment must be meant,) not accounted for, that is from the 3d to the 19th of June. Quære as to a protest for non-acceptance.

§ 13. *Assumpsit* on a note, by the endorsee against the endorser, dated December 31, 1807, payable to the deft. or order, in six months, with interest and grace. The note was originally given to Gardner & Downer, in renewal of another note, signed by S. Dillaway jr., and endorsed by S. Williams, which Gardner & Downer received for goods sold by them to S. D. jr. The note declared on was endorsed to the plt. after it became due. No evidence of any demand on S. D. jr., the maker, or notice to the deft., the endorser. Plt. relied on evidence tending to prove that when endorsed, the day of the date S. D. jr., the maker, was insolvent, and the deft. then knew it. Held, this insolvency of the maker, though so known, did not excuse the holder from a demand on him, and notice to the endorser. But see 2 H. Bl. 336; 13 Mass. R. 559.

§ 14. *Assumpsit* on a note, by the endorsee against the endorser, made by Eben. Storer, payable June 20, 1807, to the deft., who endorsed it to the plt. He demanded it of the maker on the day it became due, but neglected eight days to notify the deft. of the maker's neglect. All the parties lived within four miles of each other; endorser was discharged, though afterwards he discovered great anxiety to procure the note to be paid by the maker. The maker and plt. lived in Portland, and the deft. in Cape Elizabeth, where there was no Post Office, nor any mail between that town and Portland, but persons were constantly passing from one town to the other. An endorser so discharged may waive his discharge, and make himself liable knowing all the facts, but in this case he did not do it. He by no means did this by trying to get it paid by the maker. Plt. nonsuit. How a bill payable at a

CH. 20.


Art. 10.

Where the last day of grace is on the 4th of July, a note or bill must be paid on the third; 2 Caines Ca. in E. 196.—Note demanded of the maker on Saturday, notice to endorser on Monday is sufficient; 2 Caines R. 343.

10 Mass. R. 52, Sanford v. Dillaway.—2 Phil. Evid. 21.—11 East 114.—1 Serg. & Raw. 334, Barton v. Baker.

10 Mass. R. 84, Hussey v. Freeman, cited Phil. Evid. 17.—See 11 Johns. R. 187.

CH. 20. banking house, must be presented in banking hours. 1 Maule & Sel. 28, 29.

Art. 10.  § 15. *Assumpsit*, endorsee against the endorser. W. Smith made the note to the deft., payable to him or order, in four months &c., endorsed by him to C. Hatch, and by him to the plt. This note was said to be in the Union Bank, dated October 12, 1804, for \$6000. The runner testified, February 12, 1805, he left on the cashier's desk a formal notice to Smith of a note for \$6000, then due at the bank, endorsed by Gorham, payable in four months, but had not seen the note; gave the notice from the minute book, and this contained no other notes in which W. Smith was promiser, and which became due at that time. There was like evidence of notice left for the deft: Feb. 15, 1805. By the usage of the bank, notices to the directors were so left on the cashier's desk, and then makers of notes were notified when notes were due, exclusive of the days of grace, and endorsers at their expiration. February 1805, Smith and Gorham were both directors of the Union Bank, acting in that office. Held, from the facts the jury might infer notice to Smith and to Gorham.

10 Mass. R.  
366, Weld v.  
Gorham.

In this case too the rule adopted in *Jones v. Fales*, was adhered to, namely, that an endorser doing business at a bank, is presumed to submit to the usage of the bank, as to the time and manner of demand and notice.

1 Dallas 441. § 16. One who buys a negotiable note cannot sue it, without an endorsement, in his own name against the maker. In Virginia the English statutes as to promissory notes are not adopted; and there held, an endorsee thereof cannot have an action against a remote endorser. 1 Cranch 290, 299, *Mandeville & al.*, in error, v. *Biddle & al.*; see 1 Cranch 181, 193.

6 East 3, 17,  
Darbishire &  
al. v. Parker.

§ 17. *To omit two posts is not due notice.* Plts. had sold goods to Parker & Co., living at Liverpool. The deft. guaranteed the payment, also living there, and on his guarantee he was sued by the plts., living at Manchester. Parker and Co. sent in payment a bill accepted by one Jackson, living in London, dated June 6, 1803, payable to the plts. two months after date. August 9 it became due, and on that day was refused and noted, and notice to the plts. by post 10th, and letter delivered, but between 8 and 9, the 12th, in the morning, about four hours before the post left Manchester for Liverpool. The plts. omitted that post, also that of the 13th, but sent notice by a private hand the 13th, who delivered the notice to the drawers about two hours after the post of the 13th arrived at Liverpool, and about an hour before the post left Liverpool for London. Held, the plts. made the bill their own by their laches, and clearly because they did not write by the post of the 13th; and without deciding whether they should

10 Johns. R.  
400, where  
parties live  
in the same  
town, notice  
must be per-  
sonal.



have written by that of the 12th or not ; and if the party do not write by the next post he must account for his omission. CH. 20.  
Art. 10.

§ 18. Case against the deft. as endorser of a bill of exchange, it became due on Saturday, and was refused about two o'clock that day and noted ; again presented about nine or ten o'clock in the evening, and notice was to the plt. about noon on Monday. The plt. gave notice to the deft. on Tuesday about noon. The holder lived at Knightsbridge and the endorser in Tottenham-court road. Held, this was seasonable notice. This bill was presented last by the notary at the request of the plt's. bankers ; and the court held, they could not give notice till Monday, and were not to be considered as the plt. himself. Sunday was no day. Plt. was in time if he informed the deft. on Tuesday, by the course of the post, and it did not appear he received notice before the post went out on Monday. Notice " must be given with all the despatch that can reasonably be expected." It will be observed the seven or eight hours delay to employ the the notary was not questioned or explained, nor is it settled the law allows a day for the holder's brokers to act and give him notice ; but see *Scott v. Lifford*, s. 35 ; the insolvency of the drawee is not an excuse for presenting the bill, *11 East 114*, *Esdaile v. Sowerby*.

§ 19. *When an agent drawn on must have notice.* *Assumpsit*, endorsee against the drawer on a bill. Cotton the deft. of Charleston, S. C., agent of Cullen of Liverpool in England, drew his bill on him in favour of Miller & Robertson, also of Charleston, for £500 payable ninety days after sight. They endorsed it to Booth & Co., also in America, and they endorsed it to one Jacks, also here, and he to the plts., merchants in Manchester, in England Cotton expecting Cullen would fail, and the bill be dishonored, lodged property with Miller & Robertson, and Booth & Co., to answer the bill if returned, they engaging to restore it if exonerated from the bill. This bill was refused, and no notice was given to Cotton. Held, he was discharged ; for this " bill was drawn by an agent on a principal, and when acceptance was refused, the plt. should have given notice thereof to the drawer." Clearly when drawn he was entitled to notice, and was not deprived of it by his said deposit. No fraud in this case, and it is on the ground of fraud the courts dispense with notice to the drawer, having no effects in the hands of his drawee. The goods so deposited were Cullen's. The drawer of a bill must have reasonable notice of non-acceptance ; if his effects in the drawee's hands be attached after the bill is drawn, and before presented. Notice must be given by the holder or by one appointed by him, or by one liable as endorser. Holder may

3 Bos. & P.  
509, Haynes  
v. Birks.

3 Bos. & P.  
230, Clegg &  
al. v. Cotton.

CH. 20. sue before such notice. 14 Mass. R. 116, 121, Stanton *v.*  
Art. 10. Blossom.



§ 20. *Where a note is payable at a certain house, a demand there is sufficient.* One Sharp made his note to Wilkinson or order, and made a minute at the bottom of it that it was to be paid at the house of Saunderson & Co. Wilkinson endorsed it to Judge, he to Sanders & Co., and they to the plts., bankers, to cover their acceptances. Before the note became due Sharp absconded. Plts. sued Judge, second endorser. Held, not necessary to prove an actual demand on Sharp. 2d. If a note be made payable at a certain house, a demand of payment there is enough, and as a demand on the maker. 3d. Putting a letter into the Post Office to the endorser, in proper time, informing the maker has not paid the note when due, is good evidence of notice to the endorser. 4th. And as the plts. held the note to be paid at their house, it was demand enough on Sharp for them to turn to their books and examine his accounts with them. Not necessary to present it at the place, if it be mentioned at the bottom of the note or on the back.

7 East 359,  
Orr *v.*  
Magenes.

§ 21. *If the drawer has any effects in drawee's hands when he draws, he is entitled to notice.* Payees of a bill against the drawer. Held, 1st. Must be a protest for non-acceptance, to recover against him. 2d. Noting non-acceptance, and protest for non-payment, is not sufficient. 3d. At any rate the holder must give notice to the drawer of the non-acceptance. 4th. No excuse for the omission, the drawer had no effects in the drawee's hands, when the bill was refused acceptance or afterwards. 5th. It is enough, if he had some effects (to whatever amount) in the drawee's hands when the bill was drawn. Want of such effects averred in the plts. declaration. As to effects &c., see *Bucherdike v. Bollman*, *Goodall v. Dolley*, *Rogers v. Stearns*, &c. &c., 2, 3, 33, this art. Deft. withdrew his effects pending the bill, and before it was presented. As to such effects, see 4 Cranch 141, *French's case*.

7 East. 385,  
Parker *v.*  
Gordon.—  
3 Maule &  
Sel. 150.

§ 22. *If I accept a bill to be paid at his banker's house, the holder impliedly agrees it be presented there for payment, in the usual banking hours;* though he is not bound to agree to such special acceptance, and if he presents it after such hours, without effect, the bill is not dishonored so as to charge the drawer. A refusal at such particular place to pay a note need not be averred. See 2 Phil. Ev. 34.

1 Johns. Ca.  
99, *Liffing-  
well & al. v.*  
*White*.—  
*Putnam v.*  
*Sullivan*,  
4 Mass. R. 45.

§ 23. *Notice waived.* The endorser of a note not payable, told the holder the maker had absconded, and he, the endorser, being secured, would give a new note, and requested time to pay; the note fell due in the mean time. Held, the holder

need not demand it of the maker, or notify the endorser, for the endorser had waived notice by the course he had taken. 2 Phil. Evid. 17, but if not waived &c., the note must be demanded of the maker, when payable.

§ 24. *Reasonable notice is law, and fact for the jury.* The deft. endorsed a bill of exchange and was sued in Maryland, and judgment against him. In this action the plt. declared on a protest for non-acceptance, also non-payment, and the action was tried by a jury in Maryland, and verdict for the plt.; on this judgment plt. brought *assumpsit* in New-York. Held, the question of reasonable notice, or due diligence, was compounded of law and fact, and proper for the jury's consideration. 2d. Having been once fairly litigated and decided, though in another State, it ought to be at rest. Same is tried by a jury in Pennsylvania as a question of *fact*, and not of law. 2 Johns. Ca. 337, same a *fact*.

§ 25. *Agent must send the notice to his principal* of the refusal of a bill, both of non-acceptance or non-payment, with the protest. It is the duty of the principal, or remitter, to give immediate notice to the drawer &c., but the agent may notify if seasonably done.

§ 26. A note or check payable on demand, must be demanded in a reasonable time after receipt of it, or the endorser is not held, that is, usually twenty-four hours in the same town, or next morning, or by the next post.

*Assumpsit* by Tindal & al., endorsees of a note against Brown, the endorser. Aug. 21, 1784, one Donaldson made his promissory note to Brown for £35 2s., payable Oct. 2, 1784, or Oct. 5, allowing grace. He endorsed it to the plt. The parties all lived within twenty minutes' travel of each other. Oct. 5, the plt's clerk called on D., the maker, at 10 o'clock in the morning, and not finding him at home, left regular notice of the demand of payment. Oct. 6, between 10 and 11 he called again on D., who promised to pay the note before the bank was shut that day (bank was open from 9 to 4). Note not being paid, he called again Oct. 7, and not finding D. at home, he called on Brown, the endorser, and asked for payment; he refused, saying, the plt. had made it their own. Donaldson, Oct. 6, left word with Brown's wife, desiring Brown would pay the note for him.

Verdict for the plt. and a new trial was granted, and another verdict for the plt., and another new trial granted. Then a special verdict, and judgment for the deft.

Points settled; first, the holder himself must give reasonable notice to the drawer or endorser, that the bill is dishonoured by the acceptor, or the note by the maker. Second, that he, the holder, looks to the drawer or endorser for pay-

CM. 20.  
Art. 10.

8 Johns. R.  
173, 179,  
Taylor v.  
Bryden.—  
Quere,  
1 Cranch 260.  
—11 East  
118.—9 East  
192.—Doug.  
1, 6.—4 Esp.  
Ca. 48.—  
6 Sch. & Lef.  
461.—1 Dal-  
las 264.—  
17 Johns. R.  
26.

2 Johns. Ca.  
1, Tunno v.  
Lague.

2 H. Bl. 666.  
—Chitty 213,  
214, 215, 216,  
217.

1 T. R. 167,  
171, Tindal  
v. Brown —  
Chitty 134.

CH. 20.  
Art. 10.

1 T. R. 166.  
—Chitty 214,  
254.—6 East  
8.—Doug.  
515.

ment. Third, that the maker's giving notice to the endorser was to no purpose. Fourth, that what is reasonable notice is partly a question of fact, and partly a question of law; that is, the jury must find the facts, as distance of place &c., and the court must decide the law, what is a legal or reasonable notice, on the facts proved, so far as that the jury ought to be directed by the court.

Fifth, that the notice ought to be as early as the distances and circumstances will admit; that the holder ought to write by the next post &c. Sixth, that reasonableness of time is a question of law, not of fact. Seventh, that in no case has it been determined, that the endorser is liable, after the holder of the note has given time to the maker. See 11 Johns. R. 187, *Bryden v. Bryden*.

Salk. 442,  
Ward v.  
Evans.  
Stra. 415,  
508, 829,  
Coleman v.  
Sayer.—  
2 Stra. 1218,  
Fletcher v.  
Sandys.

§ 27. But the demand of a neighbour, the next day, has been held sufficient. 2 Ld. Raym. 928.

5 Mass. R.  
167, 170,  
Colt v. Noble.

§ 28. So it is not negligence to keep notes in the same town from 2 o'clock one day, till 9 o'clock the next day. Ld. Raym. 743. Nor here if what is usual is done; but to keep them from Saturday to Tuesday is too long.

§ 29. A citizen of the United States in India, endorsed to merchants there a bill payable in London, and returned to the United States. The endorsees sent to London, where it was protested for non-acceptance and non-payment, and sent back to the endorsees in India, who in a reasonable time sent notice to the endorser in the United States. The court held, the endorser was liable. It was the business of the endorser's agent in London to give notice to his principal.

4 Mass. R.  
46, Putnam  
v. Sullivan.  
Evidence  
the maker is  
not to be  
found &c.  
2 Caines' R.  
121, Stewart  
v. Eden.

§ 30. This was an action by the endorsee against the endorser of a promissory note. And the court held, that the plt. is not bound to prove a demand on the promisor, if it appears he has absconded before the note became payable. For "when the note in this case was due, it could not be presented to the promisor for payment," and so "there was no neglect in the endorsees."

4 Mass. R.  
245, Jones v.  
Fries.—Ld.  
Raym. 743.  
2 H. Bl. 609.  
See Tindal  
v. Brown  
ante.

§ 31. If payment of a promissory note made payable with grace, be demanded of the maker before the last day of grace, the endorser is not holden. 12 Johns. R. 423, *Griffin v. Goff*.

*Demand where and how made.* If a note be made payable at a particular house, a demand of payment at that house is a demand on the maker, as he agrees such shall be the demand.

Chitty  
on Bills 176,  
177.—2 H.  
Bl. 609, 665.  
—6 East 7.

§ 32. So the putting a letter into the post-office to the endorser in proper time, informing him that the maker has not paid the note when due, is sufficient evidence of notice to the endorser.

Chitty 177,  
179, 244.—  
1 Johns. R.  
294.

And "where there is no post, it is sufficient to send notice by the next ordinary mode of conveyance, though it may not

be the earliest." Post-office notice is good in Massachusetts, New York, &c.

CH. 20.  
Art. 10.

§ 33. If the holder of a bill do not give notice to the drawer of non-acceptance, the objection is done away, by shewing the drawer had no effects in the hands of the drawee at the time: so if the drawer be indebted to the drawee. By some authorities the drawer must have no effects in the drawee's hands, from the time of drawing the bill to the time it becomes payable, in order to make notice unnecessary; but if he have none, at the time of the refusal to accept, it seems to be sufficient; for then he cannot suffer for want of notice, and he too must know how his affairs or accounts stand with the drawee. And if on demand the drawer says, the bill must be paid, it is a promise &c., that waives notice.

2 T. R. 713,  
Rogers v.  
Stevens.—  
1 T. R. 406.  
—3 Bos. &  
P. 242.—  
5 Mass. R.  
174.—1 Bos.  
& P. 625.—  
2 Phil. Evid  
38.  
2 D. & E.  
713.

§ 34. The endorser of a bill may be sued without calling on the drawer, for both are conditional undertakers.

Chitty 182,  
183, 246,  
247.  
9 East 347,  
Scott v. Lif-  
ford.

§ 35. A bill was presented the day it became due, by the banker of the holder for payment, and it was dishonoured; and on the next day it was returned to the holder, who gave notice the next day to the drawer. Held, this notice was seasonable. This bill was drawn March 1, 1806, by the deft. on one Moses Agar, payable in three months after date. The plt. being the holder, and having placed it in the hands of his bankers, June 4, when the bill became due, a clerk of the banker's presented it for payment, and it was refused; on the 5th they returned it to the plt., who by letter put into the post-office on the 6th gave notice to the deft. of the dishonour; plt. lived in London, and the deft. at Thadwill. Jury found for the plt. New trial refused. The three material points as to notice are seen in this case; first, the day of computation: second, the post-office notice is good: third, notice to the drawer was sent, the 6th, which for any thing that appears might have been sent the 4th of June, when dishonoured by the drawee. It is sufficient notice to the endorser of a bill of exchange to put a letter into the post-office, directed to him, containing notice of its being protested for non-payment, though there be no evidence the letter was received; a mode of notice the endorser is presumed to assent to.

6 Mass. R.  
316, Mann v.  
Baldwin

§ 36. *As to notice*, a copy of the protest of a foreign bill must be given or offered to the drawer, or due diligence used to furnish him with notice, in order to charge him if he had a right to draw.

6 Mass. R.  
386, Blake-  
ley v. Grant..

*Special endorsement.* The payee of a bill of exchange endorsed it thus: "should the within exchange not be accepted and paid agreeably to its contents, I hereby engage to pay the holder in addition to the principal twenty per cent. damages."

CH. 20. Held, a *bonâ fide* holder might insert above this stipulation a direction to pay the contents to his order for value received.

Art. 10.



§ 37. Also held, that an endorsee of a bill of exchange cannot maintain an action on it against the drawer or acceptor, without proving the signature of the payee become endorser. Where notice is necessary due diligence is the same.

6 Mass. R.  
428, Thurston v.  
McKown.

§ 38. *Seasonable demand &c.* September 22, 1806, deft. at Portland gave his note to one Samuel Brooks, payable on demand. This was obtained unfairly. Seven days after, it was endorsed fairly to the plt. in Boston, who was innocent of any fraud, and he recovered. This note in seven days drawn in Portland could not in Boston be considered over due. It seems to follow, that if the holder at the end of seven days had given notice to the endorser the maker had failed to pay it, this notice had been in season.

6 Mass. R.  
449, Widgery v. Munroe  
& al.

§ 39. *Assumpsit* by the endorsee of a promissory note payable at a certain day with grace, notice to the endorser the last day of grace, the maker has not paid, is sufficient; and a party to a usurious negotiable security is not a witness to defeat it on the ground of usury. The notice to the maker was the first day of grace, but he was out of the country, so no demand of payment on him was necessary.

Berkshire  
Bank v.  
Jones.

§ 40. If the endorser of a promissory note waive his right of notice, still the endorsee must demand payment of the promiser in due time; but yet if the note be made payable at a day and place certain, and the endorser is there ready to receive payment, no further demand on the promiser is necessary to charge the endorser. And if at a bank, it is enough the officers are there at bank hours ready to receive the contents of the note, for then only need the holder call on the maker to pay.

7 Mass. R.  
449, Warder  
& al. v.  
Tucker.

§ 41. If A endorse my bill of exchange only to accommodate me as drawer, and I have no effects in the drawee's hands, yet he is entitled to notice of protest of non-acceptance. 2. "If one by mistake of the law acknowledge himself under an obligation the law will not impose upon him, he shall not be bound thereby."

7 Mass. R.  
483, Freeman v. Boynton, cited 2  
Phil. Evid.  
17.—See 13  
Mass. R. 659.

§ 42. The endorsees sued a note, dated at Boston, September 4, 1806, against the endorser, to pay in nine months; payment at Wiscasset was demanded of the maker, June 10, 1807. July 3, 1807, was again demanded of him, person demanding then having the original note, and refused; the same day notice to the deft.; the endorser, maker and deft. inhabitants of Wiscasset. The demand on the 10th of June was in season, but July 3, too late; but the demand, June 10, was bad. 1. Because the demander had not the note to deliver on payment. 2. Because no notice then to the endorser of

refusal to pay by the maker. Some exceptions to the first rule, as to notes lost or lodged in banks &c. Mail three days between Boston and Wiscasset at most.

CH. 29.  
Art. 10.

§ 43. Endorsee of a note against the endorser. October 14, 1805, one Charles Shaw gave his note to the deft. or order on demand, endorsed blank to B. Kimball, who January 1806, demanded it of the maker who was insolvent, but February paid a part to Kimball, he transferred it to the plt., but did not endorse it. Spring 1807 plt. demanded it of the maker, and Spring of 1808 demanded it of the deft. Judgment for the deft., for there was no notice to him till 1808. See s. 46; 11 East 114; 2 Caines' R. 343; 1 Sel. N. P. 317; 4 Cranch 146.

7 Mass. R.  
404, Shaw v.  
Griffith.

§ 44. *Endorsee v. Endorser*. Note for foreign money; the maker left the State before the note became due, plt. left a demand at his house the day it became due, and that day notified the deft. the note was unpaid, and requested payment. Held, the endorser was liable, though not informed the maker was absent. And the note was negotiable: as to foreign bills, see Jones v. Fales, above.

8 Mass. R.  
260, Sanger  
v. Stimpson.

§ 45. Endorsee of a note against the endorser, after the plt. had failed in an action against the maker because usurious. Held, the endorser, the original payee, was liable without notice for the amount of the note, but not for the costs of the first action, for the deft. said, he was ready to pay principal and interest, but not said costs, as it amounted to a recognition of the illegality of the note, and the deft. knowingly sold a void note. The endorsement was a new contract.

9 Mass. R.  
1, 8, Copp  
v. M'Dugal.  
See Ch. 32,  
a. 2.—2 Phil.  
Evid. 22.—  
Ld. Raym.  
180.

§ 46. *Assumpsit*, Endorsee v. Endorser of a note. Held, that where a bank establishes rules, usages, and by-laws, as to demands on makers of promissory notes and notices to endorsers, those doing business at it are subject thereto; makers notified one day at least before the note was due. Deft. had dealings at this bank, and agreed to this form of notice; not necessary to prove the party receives post-office notice.

9 Mass. R.  
155, Lin. &  
Ken. Bank v.  
Page.—Same  
v. Hammat  
150.

In this case the plt. was an endorser on a \$1500 note to the plt. given by Stephen Low, promiser, payable in ninety days, dated October 22, 1810, deposited for collection &c. January 28, 1811, notices left for Low, also for the plt. at his house, shut up, that to the plt. was returned to the bank. January 31, cashier wrote by mail to the plt. at Baltimore or Alexandria, advising him of Low's failure, and that said note remained, adding, "as you will have to pay it, best you might secure property of Low" &c. Plt. received the letter and answered it, and requested the cashier, Moriarty, to get security of Low if necessary. He caused attachments to be made or the plt. accordingly. March 5, plt. paid the note. No

9 Mass. R.  
408, Garland  
v. Salem  
Bank.—If  
one pay, mis-  
taking the  
law.—Chitty  
on Bills 186  
&c.—2 East  
460.—1 Bos.  
& P. 395.—  
4 Mass. R.  
341.—See  
Ch. 20, a. 10,  
a. 9.

Ch. 20.  
Art. 10.



evidence he then had obtained any correct information of the neglect to notify &c., but before the 8th of March he got it, and then demanded back his money. March 16, the cashier paid the sum to the owner of the note; cashier had no compensation for collecting notes, and the bank had voted in 1803, not to be responsible in such cases. Plt. after he sued the bank relinquished his attachments, of no value, on Low's estate. Judgment for Garland to recover back what he paid, and interest from the date of the writ, on the ground the plt. was under no legal obligation to pay the note, "as there had been no regular demand on the maker," "he paid the money under a misapprehension of the facts, as well as a mistake of the law;" passing the money to Cross' credit was not paying it over, so the defts. were liable, though they acted as his agents. Notice to Low, the maker, was too late.

9 Mass. Rep.  
314, White v.  
Howland.

§ 47. A note was written thus: "New Bedford, April 19, 1806. For value received, I promise to pay William White or order, the sum of \$250 on demand, with interest till paid, as witness my hand, Nathan Taber." On the back of the note was the following endorsement, viz: "April 19, 1806. For value received, we jointly and severally undertake to pay the money within mentioned, to the said William White, signed John Cogswell jr, John N. Howland." Held, these endorsers were holden as *original promisors*, and so not entitled to notice. "The effect of the deft's. signature is the same as if he had subscribed the note on the face of it as a surety." And so like the case of Hunt v. Adams. One of two executors cannot endorse a note made to them as *executors*, not being copartners. Smith v. Whiting.

9 Mass. R.  
334.

9 Mass. Rep.  
332, Tower v.  
Durill.—3  
Phil. Evid.  
21.

§ 48. Assumpsit, endorsee v. endorser, on a note, evidence the deft. said, the maker told him payment had been duly demanded of him, is no proof such demand had been made; and if the endorser, believing a demand has been duly made on the maker and due notice given the endorser, and believing himself liable, takes measures for indemnity; this does not excuse the holder from proving a regular demand and notice. And if the maker, before the note becomes due, assigns all his property to the endorser, he is considered as waiving notice, &c.

9 Mass. R.  
423, Little v.  
O'Brien.

§ 49. Endorsee v. the maker of a note of \$500, dated Dec. 1, 1808, payable in sixty days to Jos. O'Brien, and endorsed by him to the plt. An Insurance Company was incorporated, and held to vest their stock in certain specified funds; but instead of this, received their private notes, from the several stockholders, in payment of their respective shares. Held, they were bound to pay their notes at the time. Edward Little sued this note, the property of it was in the corporation.



but as endorsed blank, the court held he could sue and discharge it. The plt. came fairly by the note, though he did not prove a legal transfer to himself.

CH. 20.  
Art. 10.

*Second endorser paying a note, must give notice to the first.* The holder of a promissory note got payment of the second endorser, on the maker's default. Held, the second endorser was bound to pay, and immediately to give notice to the first endorser, and if he fail to do this as soon as he receives the note from the holder, the first is discharged.

8 Johns. Ca.  
59, Morgan v.  
Woodworth.

§ 50. *Bills at sight*, what is *acceptance*, or protest for *non-acceptance*. There is no time fixed when a bill drawn payable *at sight*, or a certain time after, shall be presented to the drawee, but it must be in a *reasonable time*, of which the jury will judge, and need not be by the *earliest* opportunity. The 9 & 10 Wm. III. does not apply to bills to be paid *after sight*.  
1 W. Bl. 1.

7 Taun. 159,  
397.—6 T. R.  
213, 250.—  
2 H. Bl. 665.  
Mullman v.  
D'Eguino.—  
4 T. R. 170,  
Leftley v.  
Mills.

§ 51. No protest for the non payment of a bill, can be before the day the bill is payable, and to demand payment before is a nullity.

6 T. R. 212.  
—Chitty, 208.

§ 52. Possession of a bill of exchange is evidence of a power to receive payment in common cases; noting for non-acceptance of such a bill is not sufficient, there must be a protest for it.

1 Dallas  
193.—2 D. &  
E. 713.—  
Chitty 208.

§ 53. *Manner of computing time.* On bills, the day of the *date* is not computed, but the day of *payment* is; and the length of time is as in the common cases, and it is immaterial whether you reckon the day of the *date* or the day of *payment*; both ways come to the same thing: for instance, a note dated June 1st, payable in 30 days, is payable July the 1st, if we reckon the day of the date as one, then thirty days must be complete before the note can be demanded or sued, and it is demandable or suable, the first moment of the thirty-first day, that is of the 1st day of July; but if we do not reckon the day of the date as one of the thirty, but begin to reckon the 2d day of June, then the note is demandable or suable the thirtieth day: that is still the first moment of the first day of July. The court now decides, not the jury, when a bill is payable.

8 Mass. R.  
453.

§ 54. In common cases, says Chitty, "when computation is to be made from an act done, the day in which an act is done, must be included," but by the *law merchant* is excluded; so a bill, at 10 days sight, presented June 1st is payable 11th, or including grace, 14th day. In this law, a month is a *calendar* month.

Chitty 208,  
but art. 10,  
s. 24.

Chitty 206,  
211.

§ 55. *Waiver of notice.* The party entitled to notice may waive it, by paying part, or by a promise to pay all, or to see it paid, or by acknowledging it must be paid; hereby he admits

Chitty 196,  
198.—7 East  
236, Lundie  
v. Robertson.  
—2 Stra.  
1214.

CH. 20. the right of action : but he must know all the circumstances.  
 Art. 10. 13 East, 213. 12 East, 433, Bateman v. Joseph, a. 20, s. 13.

Chitty  
 163 to 170.—  
 6 East 15.—  
 Chitty 162,  
 202.

§ 56. Further notice to *drawer* or *endorser*. If either *abscond* or is *absent*, demand on him, and notice is dispensed with. So, the sudden illness or death of the holder or his agent, or *other accident* excuses, if afterwards given as soon as the impediment is removed ; but in case of absence &c. it is prudent to give notice to his wife or servant, and demand payment, and if dead, of his executor or administrator, if none at his house.

Chitty 162,  
 163. See May  
 v. Coffin, Ch.  
 20, a. 10, s. 9.  
 also 2 H. Bl.  
 336. DeBerdt  
 v. Atkinson.  
 —2 H. Bl.  
 609, 612,  
 Nicholson v.  
 Gouthit.

§ 57. Notice to endorsers in actions by endorsees against endorsers, on notes where there has been *laches*. Evidence in such cases has often been admitted in Massachusetts, to show the endorsers had sustained no injury, and that the circumstances of the maker of the note were not altered, after it became due ; but Nicholson v. Gouthit is cited as law, in which case A was *insolvent* and indebted to C, and B knowing this endorsed a note made by A to B, as security to C, who also knew A was insolvent. Held, C was bound, in order to sue B on the note, to use due diligence in calling on A, and in giving notice to B. In this case the endorser's delay was three days, and the parties all lived near each other. See a. 20, s. 49 contra, and 1 Bos. & P. 652, a. 10, s. 3.

4 Cranch  
 141, 164,  
 French's ex'r.  
 v. The Bank  
 of Columbia,  
 in error.—  
 2 Bos. & P.  
 277, Whit-  
 field v. Sav-  
 age.—13  
 East 187.—  
 15 East 216.  
 Ch. 20, a. 10,  
 s. 26.

§ 58. *Accommodation endorser* of a promissory note of the maker is entitled to strict notice. Also, held 2dly, that if the drawer of a *bill of exchange*, at the time of drawing *has a right to expect* that his bill will be honoured, he is entitled to strict notice. In this case Gouthit and Nicholson was relied on, also Whitfield v. Savage, in which held the insolvency of the acceptor will not dispense with notice to the drawer. As to s. 3, Bucherdike v. Bollman, a debtor drew on his creditor, and had not the least right to expect his bill would be accepted—this was, in law, timely notice it would not be accepted. See also 21 Goodall v. Dolley, Rogers v. Stevens s. 33, and a 11. s. 3, was like Goodall v. Dolley. On the whole, the true principle is seen in French v. the Bank of Columbia. Demand on the maker of a note, and notice to the endorser according to the rules or usage of the bank at which they do their business &c. insufficient. 2 Phil. Evid. 19.

2 Phil. Evid.  
 20.

§ 59. *When post notice is given, the contents of the letter must be proved.* These must not only give notice of the proper fact, but that he to whom it is sent, is looked to for payment—the same if left at his house &c. This proof may be by a duplicate original, or by a copy preserved and proved, or by parol evidence, and this without notice to the deft. to produce the original letter at the trial.

13 Johns. R.  
 470, Johnson  
 v. Haight.

§ 60. What is sufficient evidence of sending, and contents ;

sundry cases in England and the United States. 2 Phil. Evid. 20, 21, &c. See Ch. 20 a 10, 31.

CH. 20.  
Art. 11.

ART. 11. *Protests.* § 1. Protests have been already partly considered in the articles respecting reasonable notice. Some few matters, however, will be added in this article, respecting protests.

See orders,  
Ch. 60.—4 T.  
R. 176, *Lefley*  
v. *Mills*.  
1 Salk. 131.—  
Chitty 170,  
171.—2 T. R.  
713.—5 T. R.  
239.—Bul. N.  
P. 271.—7  
East 269.

§ 2. A protest is the usual form by which the fact of *non-acceptance* or of *non-payment* is ascertained and notified; and is usually made by a notary public. In making a protest, three things are to be done, "the noting, demanding, and drawing up the protest." The noting is merely a preliminary step of modern date, and "is unknown in the law." The material part is the *making of the demand*. The party making it "must have authority to receive the money." At common law, no protest was required on *inland* bills of exchange. It is only made under the said statute of William: no interest on an *inland* bill without protest.

§ 3. It is said in Beawes, that where a bill is protested for *non-acceptance*, and notice is given, there must, also, be at the pay day, a demand, protest, and notice for *non-payment*, and that a protest must be sent *by the very next post after acceptance refused*, with a letter of advice, or no action will lie against the *drawer* or any other party entitled to notice. Noting alone is not sufficient; but the holder must retain the original bill, in order to demand payment of the *drawee*, when it becomes due.

2 Stra. 910.—  
Beawes 460.  
—Kyd 87.—  
2 Bl. Com.  
469.—Bul. N.  
P. 271, *Goos-*  
*try v. Mead*.  
—4 T. R.  
176.—2 T. R.  
713, *Rogers*  
v. *Stevens*.

§ 4. But as it is settled, that a bill *not accepted* may be demanded of the *drawer*, and sued before the day of payment, it cannot be material to support an action against him, to state or prove *non-acceptance* and notice, except only as this fact may be necessary to hasten the action; and it may be essential in an action against the *endorser*. See Art. 20, s. 29.

Dougl. 54.—  
Art. 9. Ante,  
1 Day's Ca.  
in E. 11.

§ 5. In an action on a *foreign* bill of exchange against the *drawer*, a protest for *non-acceptance* must be proved; and according to Holt C. J. a protest is a part of its constitution. A protest on *inland* bills, being required only by the statute of William, the want of it only deprives the party of his *damages*, *costs*, and *interest*. But he recovers his principal at common law, without a protest; but there must be notice. And this is now the case of common orders. Where one of three sets of bills is protested, how another may be sued.

5 T. R. 239,  
*Gale v. Walsh*.  
—1 Salk 136.  
—3 do. 69,  
*Borough v.*  
*Perkins*.—5  
Com. D. 82.  
—Chitty 174,  
5.—2 Stra. 90.  
*Johns. Ca.*  
107.

§ 6. If a bill be payable twenty days after sight, and be accepted for a longer time, there must be a protest for *non-acceptance* and notice; and so for *non-payment*, at the day appointed by the *drawer*: the same if accepted in *part*, or paid in *part*. And if the holder take a *part of the acceptor*, it does not weaken his remedy against the *drawer* &c. So if a *third*

5 Com. D. 82.

CH. 20. person accept a bill, for the honour of the drawer, there must  
 Art. 11. be a protest for non-acceptance, and notice given.

Marine Lex  
 Merc. 21, 27,  
 28, 30.

§ 7. If the acceptor be in *bad circumstances*, before the bill fall due, the holder may demand *better security*, and if not given, he may make a protest for want thereof, and give notice, so if the drawee be not found at the place, or at his house.

§ 8. A protest for *non-payment*, is sufficient to recover against the drawer; but in an action against the acceptor, the original bill must be in court accepted by him, unless it be lost.

5 T. R. 239,  
 Gale v. Walsh.  
 —Douglt. 624.  
 note.  
 4 Johns. R.  
 144.—10  
 Mod. 37,  
 Solomons v.  
 Stavelly.—3  
 Johns. R.  
 202.

§ 9. Omitting to allege in the declaration a *protest of a bill*, is only form, not to be taken advantage of on a general demurrer. What is a sufficient protest as to place, 3 Johns. R. 202, Mason's case.

§ 10. If a bill be accepted and then endorsed to the *drawer*, he, as *endorsee*, may have an action, if he had effects in the acceptor's hands, sufficient to answer the bill. But it is otherwise, where the acceptance is only for the honour of the drawer. Protest for *non-acceptance* and *non-payment*, to declare on the first alone, is good; Mason v. Franklin.

5 Mass.  
 R. 286, Bai-  
 ley v. Tabor.  
 & al.—See 2  
 Phil. Evid.  
 15, 16.

§ 11. *Certain notes were by statute made void*; on this act it was held that promissory notes void thereby, made or issued, after April, 1, 1805, when the act took effect, might be shewn to be, in fact, of a different date from that expressed; therefore, that the maker, when sued, might shew against the *endorses*, that the notes sued issued *after*, though bearing date before that time, and thereby avoid his own notes, in an action against him by an *endorsee*; for the notes were made void by statute, and whenever so, they are void in whosoever hands they come.

Sup. Court  
 U. S.—3 Dal-  
 las 365,  
 Brown v.  
 Barry, and  
 3 other cases.  
 —Chitty 169,  
 170, 172 173,  
 174.—Selwyn  
 N. P. 312.

§ 12. In the United States, on a bill payable abroad, and sued on a protest for *non-payment*, a protest for *non-acceptance* is not necessary to be produced, though it has been refused acceptance. But this point in England does not seem to be so well settled. In both countries the protest attested by a notary public, is complete evidence of the dishonour of a foreign bill, and the protest may be drawn up any time before the trial, if the bill be noted in due time.

4. T. R. 110.  
 —B. & P. 602.  
 —2 T. R. 59.

§ 13. On an *inland* bill, no *protest* for non-payment can be made, until the day *after* it is due. The party has the whole day to pay. A bill protested for *non-acceptance* may be sued immediately. 4 Johns. R. 144, 150:

Willes 396,  
 Coleham v.  
 Cook.—2  
 Stra. 829.

ART. 12. *Days of Grace.* § 1. *Three days of grace* have ever been allowed on bills; and it is now clearly settled in England, that the same is to be allowed on notes made according to the 3d and 4th of Ann, before stated: 4 D. & E. 151, Brown v. Haraden, and 170, Leftley v. Mills:

§ 2. If the last day of grace be Sunday, the note &c. must be demanded &c. Saturday. 12 Mass. Rep. 89. But in Massachusetts the court has said that a promissory note here is not entitled to *grace*, unless expressly made payable with *grace*, and except notes to banks. No *grace* on bills payable on demand.

§ 3. *Assumpsit* on a promissory note against an *endorser*, and *three days of grace* were allowed him, as on a bill to an acceptor; the note was payable Nov. 2, 1789, and sued Nov. 4, 1789. Grace varies in different countries from three to thirty days or more. And judgment for the debt. And it was said the debtor has to the last hour of the third day; but Buller J. said he *must pay on demand on any part of the third day of grace*, provided the demand be made within reasonable hours. This point was not settled till A. D. 1778. And if the last of the three days of grace be a Sunday, the bill must be paid on Saturday; but there are no days of grace in bills payable *at sight*; and the same is the rule as to any other day, not a business day.

§ 4. *Three days of grace* were allowed on a note in these words, "Three months after date, I promise to pay Mr. Smith, Currier, £40 value received, in trust for Mrs. E. Thompson." Signed and dated. So not to *order* or *bearer*. The court held on the authority of Lord Raym. 1545, that a note payable to B, without adding to *his order* or to *bearer*, was a legal note within the statute.

§ 5. But a note is not *negotiable*, if it want the words, or to *order*.

§ 6. The *three days of grace* are computed exclusive of the day on which the note or bill becomes due and payable. A bill dated May 1, payable at *usance*, shall be paid three days after the 1st of June. The import of *foreign usances*, must be stated in the declaration—not so of *inland usances*.

§ 7. When the court gave the opinion above, in *Jones v. Fales*, as to *grace*, it was new. Gentlemen, old in practice, understood that we had adopted the English law, as to this, as we had the other parts of that law, in regard to negotiable contracts.

§ 8. Grace is allowed on bills payable at *usance*, or at a certain time *after date*, or *sight*, or *after demand*. So in N. York, and the note is payable on demand, on the third day. The same in Pennsylvania—same in France.

ART. 13. *Where the party may have several actions.* § 1. The last *endorsee* may sue the drawer, and all the *endorsers* at the same time, and if the drawer pay, he must pay the costs of all the actions; but if any one of the *endorsers* pay, he is held only to pay the debt, and the costs of the suit against himself,

CH. 20.

Art. 13.

4 Mass. R. 246.

Jones v. Fales.

—Chitty,

203, 215.

4 T. R. 148,

150, Broom

v. Harriden.

—Chitty, 206,

207.

Imp. 390, 407.

—4 T. R. 170.

—Littley v.

Mills.

Dougl. 63.—

Kyd 78.

Kyd 7, &amp; 78.

—L. Raym.

743.—Stra.

829.

6 T. R. 123,

Smith v. Ken-

dal.

3 Wils. 211.

—1 Esp. 25.

5 Com. D.

8.—Marius,

18, 23, 24.—

1 Salk. 131.

—11 Mod. 92.

—12 Mod. 16.

Connet-

ticut has

adopted the

English rule

of decision,

A. D. 1818.

Chitty, 203,

217.—4 Dall.

127.

See Election.

Imp. 391.—

4 T. R. 691,

Smith v.

Woodcock.

—Chitty,

272, 273.—

2 Dallas, 115.

CH. 20. and the plt. may go on, against the *drawer and other endorsers for costs*, and the acceptor of the bill must pay, as the drawer must.

2 Mass. R.  
171, Gilmore  
v. Carr.

§ 2. But in the Supreme Judicial Court of Massachusetts, it has been decided, there can in such a case be but one bill of costs : and therefore, that when the endorsee of a promissory note had recovered judgment and actual satisfaction in an action against the endorser, he could not have costs in an action previously commenced against the promiser ; for there can be but one satisfaction. But if there had been only judgment against the endorser, and *no actual payment* of it, the case might have been different. There might have been a judgment against the drawer, for debt and costs ; though there could have been but one satisfaction of the debt. The English rule seems to be the natural effect of the admitting the several actions.

2 Dallas 144,  
150.

§ 3. *If an endorser sue a bill of exchange*, he must prove payment to the last endorsee by his receipt, or otherwise. Possession of the bill by the endorser is not enough, where the endorsement was filled up, for such an endorsement transfers the property, and payment generally is intended to be made by the acceptor.

4 Dallas 275.  
—Chitty 121,  
230, 273—  
1 Stra. 616.

§ 4. Taking in execution any party on a bill is only a discharge of him, not of any other on it, nor does it operate in favour of any other ; but if the drawer so taken, in fact pays, the endorser cannot be sued, or is discharged out of custody. The body in execution is only security, but discharged voluntarily by the plt. is payment in law, and payment discharges the bill, as to the same person, but not as to any other on it. As where one Bushby drew a bill, payable to one Sheridan or order ; he endorsed it, also one Boon endorsed it, and it came to the plt. ; he sued Boon and took him in execution, and afterwards let him out on a letter of license, without paying the debt ; the plt. then sued Sheridan and held him to bail, and the deft., Mullhall, was one of them. Sheridan not paying the debt, plt. sued the deft., who insisted the debt was paid by the imprisonment and discharge of Boon. Held, it was a discharge only as to Boon ; for each endorser was independent of the rest, but said Blackstone J. it was not a discharge even as to Boon's goods after his death, by the statute 1 Jam. 1.

2 W. Bl. 1235,  
Hayling v.  
Mullhall.

1 Ld. Raym.  
742.

Endorsee sues the endorser, he sues the acceptor of a bill ; to recover, he must prove he has paid it to such endorsee. A bill of exchange cannot be protested for non-payment before it is payable, but it may because the drawee has absconded.

10 Mass. R.  
88, Porter v.  
Ingraham.

Assumpsit on a promissory note by endorsee against the endorser, makers, James M. Ingraham, and John Gould,

November 18, 1809. June Term 1811, the plt. recovered judgment against the makers, sued out execution and committed one of them to prison; execution was returned without any satisfaction but this commitment. *Alias* and *pluries* issued against the other maker and estates of both, these not satisfied. September 19, 1812, one Brooks engaged to pay the execution, thereon the goaler released the one committed, and afterwards offered the money he had received to one Richardson, assignee of the judgment, who refused to accept it. Judgment for the plt., and held the judgment against the makers had not been satisfied; that is, no valuable satisfaction accepted by the plt. or any one authorized to receive payment, and to discharge the plt.'s demand, so the case of *Gilmore v. Carr* was not applicable. Here was evidently a fair leaning in the court to get round a very exceptionable decision given in that case, contrary to all the English decisions in like cases; for when the law itself authorizes one to bring several actions at once, as against principal and sureties in a bond, or against the maker and the endorsers of a note, and to incur costs in three several actions, what good reason can be given if he accepts his debt of one and his costs, he should not only lose his costs against the others, but even have to pay them costs, when this very acceptance may be fairly construed to prevent further costs and to settle the debt, and not to oblige the plt., not only to lose costs legally incurred or created, but to pay costs in actions legally commenced, and carried on at the costs of the several defts., and on the very terms of their several contracts.

Here the debtor committed, though discharged by the officer, was not discharged by the consent of the creditor; so no bar to pursuing another debtor for the same debt. Costs in all, in New York, 8 Johns. R. 356. So in Pennsylvania. 2 Dalls 115.

*Blank endorsement.* One Violett wrote his name on a blank paper, meaning one Brookes should make his note on the other side to Patton; this was done, and held Violett was liable as endorser, even on the laws of Virginia, which generally put promissory notes on the ground of bonds rather than inland bills.

ART. 14. *Blank endorsements, forged bills, and fictitious payees.* § 1. If the drawee of a forged bill accept and pay it to, or pay it only to a *bonâ fide* purchaser, he cannot recover back the money paid to such purchaser. As explained Ch. 9, a. 14; Ch. 20, a. 8, bearer.

§ 2. A bill drawn in favour of a *fictitious* payee is a forgery. In this case the deft. and others drew a bill on the deft. alone, in favour of fictitious persons, which was known to all parties, and the deft. drew the bill payable to Gregson & Co., ficti-

CH. 20.  
ART. 14.

5 Cranch  
142, Violett  
in error v.  
Patton.

1 W. Bl. 390,  
Price v. Neal.  
—Chitty 236.

3 T. R. 174,  
182, Tallock  
v. Harris.

CH. 20. tious payees, at the request of Potter, and endorsed the bill,  
 Art. 14. by writing Gregson & Co., to Lewis & Potter, who endorsed it to the pls., and the deft. received the value from the second endorser. Adjudged that a *bonâ fide* holder may recover on this bill against the deft. on the ground, that "giving such a bill is, as it were, an assignment of so much property, which becomes money had and received to the use of the holder of the bill." Judgment for the plt. This could be the case only among those privy to the facts.

3 T. R. 481, § 3. The court held, that if a bill be drawn in favour of Minet v. Gib- a fictitious payee, and the acceptor and drawer do know it, son & al.— and the name of such payee is endorsed on the bill, an innocent endorsee may recover on it, giving a valuable consideration, against the acceptor of the bill payable to bearer. Imp. 414, 192, 400.

Dougl. 514, § 4. A *blank* endorsement on a blank note or paper, binds Russel v. the endorser. It is as a letter of credit for any indefinite Longstaff. sum. And for money lent a bill or note is good evidence, and the 3 & 4 of Anne only gives an additional remedy; an endorser is liable for money lent.

1 H. Bl. 313, Endorsees against the drawer of a bill of exchange; six Coles & al. v. counts. A signed his name to a *blank paper* duly stamped, Emmet. and delivered it to B, for the purpose of drawing a bill of exchange on it in such manner as B might think best. B drew a bill payable to George Chapman, a fictitious payee, or order, and endorsed it over to C for a valuable consideration, who was ignorant of the transaction. Held, C, the innocent endorsee, could maintain an action against A, as the drawer of a bill payable to bearer, on a count to that effect; or that C might recover on a count stating the special circumstances of the case, if that count do not vary from the verdict; and when all parties know a bill cannot be legally endorsed, it may be used by an innocent holder for a valuable consideration, as a bill to bearer. See also 2 H. Bl. 187, 211, 288, 298; 3 D. & East 281; 1 H. Bl. 569, 625; 2 Show. 235; Sayer 223; 1 Burr. 452. The bearer must prove the maker's signature, and that of each endorser he claims under, 2 Phil. Evid. 15, 16, and recognises Grant v. Vaughan as to lost notes &c.

2 Wash. 164. § 5. In this case Timothy Parsons wrote his name on a Sumner v. piece of paper, and gave it to John Brown; but there was no Parsons, evidence of the intent, or of any connexion in business between S J. Court, them. John Brown made a note on the other side of the paper, in these words:

"Boston, April 18, 1796, for value received I promise to pay Jesse Sumner or order 1843 dollars, on demand with interest. JOHN BROWN."

May 16, 1796, Jesse Sumner received \$450 10 of John Brown, in part of the note, and endorsed this sum on it.

2 Wash. 164.  
 Sumner v.  
 Parsons,  
 S J. Court,  
 Lincoln, July  
 1801. See  
 Dougl. 51.—  
 Imp. 414.—  
 H. Bl. 313.  
 Same case  
 Amer. Prec.  
 113.—Chitty  
 104.



Jesse Sumner then got a writing in these words, over the name of Timothy Parsons, to wit: "In consideration of the subsisting connexion between me and my son-in-law, John Brown, I promise and engage to guaranty the payment of the contents of the within note on demand," and then sued Timothy Parsons, declared on the promise, specially stating it and the note; but did not aver any demand on John Brown or notice to Parsons. In two trials in the Supreme Judicial Court of Massachusetts it was held, that Parsons was liable, and that Sumner had a right to fill the endorsement, so as to make Parsons a common endorser of the note, with the rights and obligations of such, or a guarantor, warrantor, or surety, liable in the first instance, and in all events as a joint and several promiser would be. It must be admitted, that this case was carried as far as any case had gone, and on the review the court was not unanimous, and it has since been questioned. Blank endorsement on a blank piece of paper &c. 5 Cranch, *Violett v. Patton* 142, 154, similar case.

CH. 20.

Art. 15.

§ 6. One Christian at Dunkirk drew a bill on the deft. in London for £90, payable to Henry Davis or order. Another Henry Davis got the bill and endorsed it to the plt. The court held, that this endorsement was a forgery, and that the plt. could not recover against the acceptor; for the plt. must prove, according to his declaration, that Henry Davis, the true payee, endorsed the bill; whereas he did not endorse it, but a stranger did endorse it, and his being of the same name makes no difference. Lord Kenyon contra.

4 T. R. 28,  
33, Mead v.  
Young.—  
2 Phil. Evid,  
31.

§ 7. See the case of a blank endorsement &c., *Josselyn v. Ames*, ante, article 7, this chapter. Altering the date of a bill, see *Masters v. Miller*.

4 D. & E. 320.  
—5 D. & E.  
367.

§ 8. A gave a note to B to pay \$100 in sixty days; B, the promisee, contracted not to demand it under ninety days; B may sue it in sixty days; his promise not to demand it under ninety days was a collateral promise, for the breach of which A might have a separate action if there was a sufficient consideration, but it varied not the note.

4 Mass. R.  
414, Dow v.  
Tuttle.

§ 9. If a bill be payable to a fictitious person or his order, it is not payable to the order of the drawer or bearer, unless the acceptor know the payee is a fictitious person.

Chitty 1,  
Bennet v.  
Farnell 279.

§ 10. If the endorsee of a bill sue the acceptor, and he cannot prove an endorsement by the payee, he may prove the payee a fictitious person, so could not endorse. Held, as drawer and acceptor knew this, the bill should operate against them as a bill to bearer, and the holder sue as bearer,

1 H. Bl. 509.  
Chitty 84,  
109.

ART. 15. *Endorsers, how liable, and amount &c.* § 1. An endorser is liable to every subsequent endorsee, not to any pre-

Skin. 348.  
410.—4 T. R.  
470.—Salk.  
Salk. 68.

**CH. 20.** ceding one, except as in article 6 ; though the bill be payable  
**Art. 15.** to B or bearer ; for every endorsement makes a new bill, and  
 also though the bill was forged, for the endorsement charges  
 the endorser, and hence the drawer's fraud need not be proved,  
 and the endorsement is a new contract.

2 Stra. 1087, § 2. The endorser cannot be charged with the payment of  
 Collins v. the note till there has been a demand on the maker, or an  
 Butler.— attempt to find him, made ; (see Heylen v. Adamson, Burr.  
 2 Burr. 669.) for here the drawer or maker of the note is the real  
 —Phil. Evid. debtor, as the acceptor of a bill is. The case of Heylen v.  
 43. Adamson, by the endorsee of a bill against the endorser in  
 which it was held, a demand on the drawer of the bill was not  
 necessary for the reason above stated ; 1 Stra. 515, Lawrence  
 v. Jacob 441.

Stra. 1246, § 8. If the endorser pay part of the note, he thereby ac-  
 Fuller v. knowledges his liability, and no demand on the drawer is  
 Vaughan.— necessary on this account also. The idea formerly adopted,  
 Stra. 745. that if the endorsee received part of the drawer, the endorser  
 was discharged, is not now law. 2 Stra. 1245, Kellisle v.  
 Robinson.

Imp. M. P. § 4. If the drawer be sued by the endorsee, and his bail  
 409. pay the money and costs, this discharges the endorser as much  
 as if the drawer himself had paid it : and 1 Wils. 46.

2 Atkyns 181, § 5. If an endorser have a note given to him by his wife or  
 Haly v. an infant, and endorse it, he is liable to pay it to the endorsee.  
 Lane.— So if only the last endorsee paid a valuable consideration for it.

5 Com. D. 94. In an action against the endorser it is necessary to prove  
 2 Bl. Com. his hand, not the maker's of the note. 2. It is necessary to  
 469, 470.— prove a demand on the drawee of the bill, or maker of the  
 Salk. 137, note, or that he was sought for and could not be found. 3.  
 128.— That this was done in convenient time after the assignment.  
 12 Mod. 244, 4. It is fair to give notice. 5. The demand must be after  
 Lambert v. the endorsement. 6. If one endorse *blank*, the endorsee may  
 Oaks.—1 Ld. use it as an acquittance, or as an assignment to charge the  
 Raym. 443.— endorser.  
 2 Stra. 1087.

Chitty 223, § 6. If a note be made by a minor, so voidable as to him,  
 Ensign v. yet the endorser is held, and the minor when of age may by  
 Woodhouse express promise make the note good, though not by bare ac-  
 94, 25. knowledgment or paying part, and though the endorsement of  
 a *feme covert* is void, the holder may sue any *after* party. See  
 Ch. 90, a. 10, as to evidence in relation to negotiable debts.

6 Cranch 221, § 7. The endorsement of a bill or note is a new substantive  
 Slacum v. promise or contract. 2. And when the endorser of a foreign  
 Pomey. bill of exchange is sued by the endorsee, he is liable to dam-  
 Dougl. 679. ages according to the law of the place where the bill was  
 —Rev. Code endorsed. 3. In debt against him on the act of Virginia, the  
 v. 121. declaration must aver notice of the protest for non-payment.

4. And a defect in the declaration sufficient to arrest the judgment, may be alleged, as an error in the court in which error is brought. This action was on the act of Virginia, the deft. endorsed the bill in Alexandria, drawn abroad. CH. 20.  
Art. 15.

This act provides, "that when any bill of exchange is or shall be drawn for the payment of any sum of money in which the value is or shall be expressed to be received, and such bill is or shall be protested for non-acceptance or non-payment, the drawer or endorser shall be subject to *fifteen per centum* damages thereon, and the bill shall carry an interest of *five per centum per annum* from the date of protest, until the money therein drawn for shall be fully satisfied and paid." "And that it shall be lawful for any person or persons, having a right to demand any sum of money upon a protested bill of exchange, to commence and prosecute an action of debt for principal, damages, interest, and charges of protest, against the drawers and endorsers jointly, or against either of them separately; and judgment shall and may be given for such principal, damages, and charges, and interest upon such principal after the rate aforesaid to the time of judgment, and for interest upon the said principal money recovered after the rate of *five per centum per annum*, until the same shall be fully satisfied."

1 Cranch  
194, Wilson  
v. Lenox.  
See Ch. 130,  
a. 8, s. 14.

§ 8. This also was a case of an endorser in Virginia, in error from the Circuit Court in the district of Columbia; and held, the endorsee of a promissory note may recover the amount from a remote endorser, in equity, though not at law. But second, equity will make that party immediately liable, who is ultimately liable at law. Third, in equity the remote endorser has the same defence against the remote endorsee, as against his immediate endorsee. Fourth, the deft. has a right to insist that the other endorsers be made parties. One Gray gave the note to M. & J., March 2, 1798, for \$1500, payable to them or order; they endorsed it in blank. On the face of the note it was declared to be negotiable in the bank of Alexandria. Gray put it into a broker's hands, who passed it to one Scott for flour, he sold for £1200 in cash, and paid the money to Gray. Scott passed it, without endorsing it, to M'Clenachen in the purchase of flour, and he endorsed to Riddle & Co. in payment of a precedent debt. Gray failed to pay, and was discharged by the insolvent act of Virginia, in the complainant's suit on the note. They then sued the defts. at law on their endorsement, and got judgment below, reversed above, on the ground an endorsee cannot have an action at law against a remote endorser of a promissory note; therefore they brought this bill in equity, dismissed below, on the ground there was no equity in the bill; they appealed. The

5 Cranch  
322, Riddle &  
al. v. Man-  
deville.—  
Jameson's  
case in Chan-  
cery. See 4  
Cranch 241.

1 Cranch  
181, 193, 367.  
—1 Cranch  
290.—See a.  
20. 47.

CH. 20. complainants paid a valuable consideration for the note, and  
 Art. 16. the defts. put it into circulation, and in bar of this bill they  
 pleaded the said judgment at law in their favour. To this  
 plea the complainant demurred, and the court sustained the  
 demurrer, and ruled the defts. to answer. Their answer  
 stated they received no consideration for their endorsement in  
 blank, and put it into circulation only by delivering it to Gray  
 to be discounted at the bank. Judgment as above, for the  
 plts. This novel case seems to have been decided on these  
 principles: 1. As the defts. endorsed the note and expressly  
 made it negotiable, and gave it credit into whose hands soever  
 it came, they were liable. 2. As the maker was so discharg-  
 ed, he was out of the case. 3. As in the action at law the  
 remedy was mistaken, the judgment against the plts. was  
 no bar to their bill in equity.

See a. 20, s.  
 29.

3 Dallas.—  
 Chitty 86.—  
 1 Dallas 148,  
 Morris v.  
 Tarin.

ART. 16. *The amount recovered on a protested bill.* § 1. This  
 sum in Massachusetts was principal, interest, ten per cent.  
 damages, and costs on foreign bills generally, and interest and  
 costs on inland bills, and this rule extends to bills drawn in  
 one State on merchants and others in another State. The same  
 rule as to foreign bills in Rhode Island and Virginia. But by  
 Massachusetts act, June 19, 1819, (in Maine, Ch 88) the  
 damages on inland bills are regulated, drawn, or endorsed in  
 Massachusetts, payable in any other of the United States or  
 territories, and protested; three per cent. if payable in New  
 Hampshire, Vermont, Rhode Island, Connecticut, or New  
 York. If payable in New Jersey, Pennsylvania, Delaware,  
 Maryland, Virginia, or the District of Columbia, five per cent.  
 If payable in North Carolina, South Carolina, or Georgia, six  
 per cent. If payable in any other of the United States or  
 territories, nine per cent. If any bill of exchange or order  
 for payment of money be drawn or endorsed in this State, for  
 \$100 or more, and payable within it, distant seventy-five miles  
 or more from the place where drawn or endorsed, and not  
 paid; damages one per cent. in addition to the contents, law-  
 ful interest, and costs, 1, 3, 5, 6, 9 per cent. is in addition to  
 these in all the cases. Twenty per cent. damages in Penn-  
 sylvania, on 12 William 3, Ch. 70; besides interest and  
 charges. A bill remitted to pay a debt, see 4 Johns. R. 27.  
 The twenty per cent. in New York is in lieu of re-exchange  
 &c.

4 Johns. R.  
 119.—Chitty  
 189.

§ 2. If the course of exchange alter in case of a foreign bill,  
 the acceptor is liable to pay according to the rate of it on the  
 day the bill became due. And as to exchange, see Mellish  
 & al. v. Simeon, Ch. 20, a. 20. See Pollard v. Herries, 3  
 Bos. & P. 335; 4 Johns. R. 119, 124, 125.

§ 3. July 6, 1807, an English merchant living in Manchester, in England, drew his bill, payable to himself or order in London, on an American house having their *domicil* in Boston, accepted by one of the house then in Manchester, is a foreign bill, and the same as if accepted in Boston, and payable in London. The damages on protest are the amount of the bill and expenses of protest and interest thereon at six per cent. from the time it becomes payable, also a tenth part of the original sum and like interest thereon.

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6 Mass. R. 157, 165, Grimshaw v. Bender & al.

ART. 17. *Circuitous actions on notes &c.*

If C make a note to A, and A endorse it to B, and B endorse back to A again, A shall not have an action against B on his endorsement of this note, for if he could, then B would have an action against A on his endorsement of it, and there would be this circuitry of action to no purpose. But A may prove his endorsement was only mere form, see post : but see 1 Wils. 46. If second endorsee of a note sue the first become endorser, he may prove the plt. gave no consideration. 12 Johns. R. 159 ; 14 do. 349.

4 T. R. 470, Bishop v. Hayward.—3 Com. D. 64.—Chitty 271.—Art. 21.—10 Johns. R. 224.

ART. 18. *Evidence against the endorsee &c.* See a. 10, s. 5.

§ 1. The deft. made a note, payable October 31, 1799, and afterwards it was endorsed to the plt. who brought this action against the deft., the maker. The deft. was admitted to prove, that certain transactions took place between Grosvenor, the promisee and endorser, and Fuller, the maker, before the actual endorsement of the note (originally made in blank) by which the note had been completely satisfied ; and this admission was on the ground, that the actual endorsement was so long after the note had become due, that when endorsed it was a discredited note. But how long a note must have been due before it is discredited, is a point not accurately settled.

1 Mass. R. 1, Gold v. Eddy adm.—Davis v. Brown, 3 T. R. 81.—5 Mass. R. 334, Webster v. Lee, and 546 ; and Penke 140.—2 Johns. R. 300.—7 D. & E. 419 ; see ante, a. 10.

§ 2. In this case the same principle was adopted, and the court held, that if a note be actually endorsed after over due, there is reason to suspect it ; and then the maker may go into such a defence against the endorsee, as he would have against the promisee ; same if the note be endorsed in trust for a relation of the endorser ; *secus* if endorsed without recourse. 2 Johns. R. 50, 52, Russel v. Ball & al.

5 Johns. R. 118.—3 T. R. 81, Brown v. Davis — 1 Bos. & P. 399, Taylor v. Mather—Chitty 105, 106.

§ 3. 5 Mass. R. 334, 340, the same point was decided. And on this case endorsee suing the endorser of a promissory note, if the deft. set up a defence of payment to the promisee, he must prove it was made before the note was endorsed, and by such payment the promise is discharged, and the note is absolutely void. In this case there had been a reference between the promiser and promisee, but no endorsement on the note. 1 Johns. 331.

Webster v. Lee—5 Johns. R. 118.—8 Johns. R. 454.—12 Johns. R. 345.

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§ 4. So a note on demand, endorsed long after made, is liable in the endorsee's hands to all the equities, as between maker and payee; because the endorsee takes it with sufficient ground of suspicion to cause him to inquire into the state of it. *Secus* a fair endorsee, *Warren v. Lynch*, 5 Johns. R. 239; 2 Cain. 369. *Furman v. Haskin*; see art. 20, s. 17; 1 Dallas 411; 9 Johns. R. 244.

12 Mod 406,  
617, 521.—  
Salk. 124.—  
3 Salk. 68.—  
Holt. 298.

ART. 19. *Bills and notes received in payment, the effect.*

A bill or note of another taken in payment at the time of the sale of the goods &c. is valid, if the vendee do not know it to be a bad one, and the vendor cannot have an action for his goods sold. *Quære*, if the debt be not discharged at the time. 6 Johns. R. 110; 9 Johns. R. 310.

4 Mass. R. 93,  
Greenwood  
v. Curtis.—  
6 Mass. R.  
143. *Maneely*  
v. *M'Gee*.

§ 2. If the parties settle accounts, and he who falls in debt to the other in a certain sum, gives him a note, not negotiable, for that sum, it cannot be considered as a payment of it; for one simple contract debt is, in law, no discharge of another simple contract debt. But it is otherwise, if payment be made in a negotiable note which passes current in the market; see post. Given for an existing debt by simple contract is *prima facie* payment; B owes A \$50, A takes C's promissory note in payment, payable to A, it is at his risk. 7 Mass. R. 286, *Wiseman v. Lyman*.

5 Mass. R.  
299, *Thatcher*  
v. *Dinsmore*.

§ 3. In this action, it was held that a *promissory* note, given in consideration of a simple contract debt, due, is a discharge of a simple contract. So of an open account. 6 Cranch, 254.

Chitty  
118, 119.  
—7 T. R. 65,  
66.—2 Johns.  
Cas. 438.—3  
Johns. cas.  
71.

§ 4. Formerly it was held, that if A sold goods to B, and took a check on a banker, without any objection, it was absolute payment, though the banker failed; but it is now settled that in such case, unless it was expressly agreed at the time of the transfer &c, that the *assignee run the risk*, he may, in case of default, sue for the price of the goods, not only because one simple contract does not discharge another, but because a negotiable note, while between the original parties, is like any other simple contract; but then such note must be shewn to be lost or cancelled at the trial. 1 Johns. R. 34.—8 Johns. R. 389.—9 Johns. R. 310, 311, *Johnson v. Weed. & al.* So if the purchaser of goods pays in another's note, *falsely representing* it. 6 Johns. R. 110.—5 Johns. R. 68.—9 Johns. R. 310.

Chitty 31, 32.  
A note made  
in France,  
payable to  
A in America,  
is valid,  
though not  
stamped according  
to French law.  
1 Johns. R. 94.

ART. 20. *Several cases.* § 1. Though generally one *joint tenant*, or person jointly interested with another, in real or personal property, is not capable, of himself, of doing any act which may tend to prejudice the other, yet, by the custom of merchants, where there are two joint traders, and one accepts for himself and partner, a bill drawn on both, it binds both, if it

concerns the trade ; otherwise, if it only concerns the acceptor's distinct interest, and the holder is aware of the fact.

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§ 2. A note given in the *partnership* name, by one partner for his private debt, is void as against the partnership, in the hands of the creditor, and even in the hands of a friendly endorser, who endorsed it at the request of the partner, not knowing the consideration of the note. And notes issued in the partnership name, after a dissolution of the partnership, only bind the one issuing them, and so if the new notes given, be for *partnership* debts.

Chitty 32.—  
2 Caines' R.  
246, Living-  
ston v. Hastie.  
—2 Johns.  
300.

§ 3. "One partner cannot bind the other by *deed*, without an express authority so to do ;" but if A execute a deed for himself and his partner, in his presence, and by his authority, it is a good execution, though only sealed once, was on a bill of sale decided.

4 T. R. 313.  
Ball v. Dun-  
sterville.—  
Watson 163.  
—4 Dall. 68.  
—Chitty 35.  
—2 Johns. R.  
300, Lansing  
v. Gaine.

§ 4. When a partnership is *dissolved*, it is necessary to give personal notice to those who have dealt with it, or prove they *in fact* saw the gazette notice ; but this is sufficient for persons who have had no *previous dealings* with the partnership. Watson's Partnership, 284.

§ 5. *Value received*, is implied in every bill and endorsement, as much as if expressed *in totidem verbis* ; and if a declaration be, that the note was endorsed for *value received*, this *value received* need not be proved. A *bearer* taking a bill, under *suspicious* circumstances must state he gave a value for it, as when it has been lost. When the holder has given a *full value* for the bill, &c. the deft. is not allowed to shew he received none, though the plt. knew this circumstance when he took it, unless he, also, knew that he, of whom he received it, was acting *fraudulently*.

Chitty 59, 60,  
65.

§ 6. *When a note or bill pays a prior debt*. Generally one contract not under seal, cannot extinguish another similar contract. "And a mere promise to give time for the payment of a debt already due, is not binding." But if I sell goods to A, and take a bill or note in satisfaction thereof or of a former debt, I cannot sue the original debt, till the bill, &c. is due, except A knew it was of no value ; then I may immediately sue him on his original liability ; as if he draw a bill on one having no effects, not accepted. Such a bill is a nullity.

Chitty 85,  
86, 37.  
12 Mod. 517.  
—6 T. R. 62,  
Packford v.  
Maxwell.—

§ 7. Three men gave a covenant to A : one of them gave a bill for part of the debt, and judgment was had on the bill. No bar to covenant against the three, not being accepted in satisfaction of the covenant debt, nor, in fact, to have produced it.

Chitty 86.—  
3 East 251,  
Drake v.  
Mitchell.

§ 8. A first bill is given, then a second bill *in lieu of it*, but the first remains with the holder, and the second is not paid ; he may sue the first.

Chitty 86, 87,  
88. See Ch.  
24, a. 5.

CH. 20. If I sell goods, and adjust the account, and take a bill,  
 Art. 20. which is not accepted; this taking the bill is conclusive evidence of the sum due, in an action for payment for the goods. If one take a bill for goods sold, and finds it bad; yet, if he compute damages upon it, and demand it, this is an election to rely on the bill.

Cain 117,  
 Roget v.  
 Merritt.—1  
 Cranch 181,  
 290.—2  
 Johns. R. 455,  
 Markle v.  
 Hatfield.—  
 3 Cranch  
 311.—5 D. &  
 E. 613.—3  
 East 146.

§ 9. One agrees to accept notes in payment of goods, and before delivery, the notes turn out to be bad: a tender and refusal of them is no payment, unless the vendor agreed to run the risk of their being bad.

§ 10. A sold cattle to B, and received in payment a *bank note*; neither knew it was bad: A paid it to C, who discovered it was forged. Held, A might recover against B on his original contract for the cattle sold, for a forged note is a nullity—no payment at all. But if one receive a note as conditional payment, and pass it away, he cannot sue for the goods sold; he cannot have a double satisfaction. 1 Cran. 181, if a forged note of a third person, it must be had at the trial.

Chitty 112.  
 —1 Dall. 193.  
 Morris v.  
 Foreman.—

§ 11. An indorsee may strike out special, as well as general endorsements, and the holder, by delivery, may consider himself as endorsee of the payee, however remote in fact he may have been.

Chitty 119,  
 120.

§ 12. If I assign a bill for a sufficient consideration to A that I know to be of *no value*, and he be not aware of the fact, I must repay to him the money I received, in an action for money had and received: this must be on the ground of *deception*, or of the *law merchant*, for at *common law* an *assignment* is no warranty.

Chitty 133,  
 134.

§ 13. If an agent do not present a bill for acceptance, with due diligence, and the drawer fails, the agent is liable for his negligence, unless he can shew the bill would not have been accepted; also "a neglect to make a presentment at a proper time, may be excused by illness, or by other cause, or by accident."

Chitty 245.  
 —6 East 14.

§ 14. If the holder receive notice the bill is dishonoured, he ought to send notice to the party he looks to, by the *next practicable post*—"at all events by the *post* of the next day after notice" received by him.

3 B. & P. 340.  
 —Chitty 186.

§ 15. If a bill cannot be legally accepted, or paid, the drawer is not liable to be sued in the country where, by some act, the illegality is created.

Chitty 186.—  
 5 East 124.—  
 3 Caines R.  
 286.

§ 16. And if I draw a bill in the United States, on A, in London, and am discharged by our laws, and the bill there is protested for non-acceptance, I cannot be sued there. The terms "*value received*," in a note, not within the act, will not of themselves imply a consideration.



§ 17. *What payment discharges the payer.* Regularly every bill or note must be paid to the proprietor of it, or to his proper agent or representative; if made payable to a *feme sole*, it must be paid to her husband after her marriage; if to A in trust for B, it must be paid to A, or his endorsees; not to the payee, after endorsed; not to the agent of an attorney; may pay to the holder of a bill or note endorsed blank who stole it, if the payer know not this fact, or if known it was stolen, he may pay to a *bonâ fide* holder, when due; not to one after he has committed an act of bankruptcy, and that known; otherwise, if not known. Bills are paid in business hours, if foreign.

§ 18. A note is due on the last day of *grace*, and if payment be refused, the maker may be sued on *that day*, after demand and refusal, per Parsons C. J. It must be demanded that day, of the maker, and notice to the endorser, before such demand, is bad; though otherwise seasonable. Proving a debt against a *bankrupt acceptor* is no discharge of other parties. A draft on a bank received by a creditor, pays his debt in two cases; 1st if the receiver do not use due diligence to get it paid; 2d if he expressly agrees to run all risks; and if he write a receipt in full, it is not evidence of such an agreement. And when a bill is taken in payment of a debt, and the party sues on the original consideration, payment of the bill will be presumed, till the contrary appears. See Hayling v. Mullhall, and Hull v. Pitsfield.

§ 19. If the holder of a bill or note take a bond or any security, of the acceptor of the bill or maker of the note, without the assent of the other parties thereto, *payable at a future day*, he discharges them; same rule as to sureties, and notice of non-payment does not aid his case; so if he receive part payment of the acceptor, and take a *new acceptance* for the residue, *payable at a future date*, and in the mean time retain the original bill as security, this is giving time, so a new credit to the acceptor, and discharges the endorser; for it abridges the rights of the other parties to the bill, in postponing their opportunity of suing; for taking the new bill was an agreement the original bill should not be enforced in the mean time; hence, here was giving time to the acceptor; whereas, had the endorsees, the *plts.*, called on the *defts.* the endorsees, immediately, to pay the original bill, they might immediately have sued the acceptor; the new security ought to have been by the consent of the endorsees, or their implied consent, on notice, and their not objecting, according to the case of Clarke v. Devlin. Maker pays part *after* due, and *before* notice to endorser, he is discharged.

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Chitty 218,  
219, 220, 221,  
223, 224, 225.  
—1 H. Bl. 89.  
—Doug. 622.  
—4 T. R. 28.  
—2 T. R.  
113, 287.—7  
T. R. 711.—  
See a. 18, s.  
4, Park v.  
Page, Boston,  
Nov. Term,  
1808.  
2 Caines' R.  
343, Jackson  
v. Richards.  
—Chitty 227,  
274.—Willes  
561.—12  
Johns. R. 423.  
—5 Esp. R.  
52.

8 East 566,  
Gould & Rob-  
son, cited  
Chitty 229.  
Notes deliv-  
ered after  
they bear  
date, are val-  
id, only from  
the day of  
delivery, and  
are consider-  
ed as drawn  
on that day.  
2 Johns. R.  
300.

3 B. & P. 363.  
8 Johns. R.  
334, Crain  
v. Colwell.

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2 B. &  
P. 61.—3 B.  
& P. 363.—  
Chitty 230.

5 East 147.—  
Chitty 232,  
273, 274.

Chitty 233.

6 East 14,  
Darbyshire v.  
Parker, cites  
Hilton v.  
Shepherd.

Chitty 321.

7 Johns. R.  
70. Losee v.  
Dunkin.—  
4 Johns. R.  
224.—8 Johns.  
R 374.

§ 20. The same is the case if the endorsee sue the acceptor, and on execution receive payment for part *and take his security for the rest*, with the exception of a nominal sum only, he discharges the endorser, and the effect would have been the same, if the plt., the endorsee, had let the acceptor out of custody on a *ca. sa.* But though this discharges an after endorser, who could resort to the party indulged, it does not discharge a prior endorser, whose remedy would not be varied in respect of the indulged party; therefore the holder may let out of custody a *subsequent* endorser, on execution, and yet sue a *prior* one, without the subsequent one's paying the debt, for the holder of a bill or note may do what he pleases as to any party on it, yet hold all the others, if thereby he does not abridge their rights.

§ 21. If the *endorser* pay the bill or note to his *endorsee*, he is entitled to a receipt; for he cannot without one, sue the acceptor of the bill, or maker of the note: the mere possession of the bill or note, not being evidence he paid it; but *quære*, as it is not according to the course of business for him to have the possession, without his paying; clearly this possession *prima facie*, affords a presumption he paid it, though it is always best for him who pays, to take a receipt, and have the fact stated in it, that such a party paid.

§ 22. The holder of a bill, gave notice of a bill's being dishonoured, to the fifth endorser, the day it was refused; he, the next day, to the fourth; he, the next day, to the third; he, the next day, to the second; and he, the next day, to the first endorser, and held to be sufficient notice: all the parties lived in London, and the neighbourhood.

§ 23. The last endorsee, may strike out all the endorsements in blank, but the first, and declare on that; thereby, this endorsee creates a *privity*, between himself and the first endorser, now the only one. This endorsee thereby abridges no rights but his own; and not always his own, for by raising *this privity*, he is often enabled to go upon his money counts, and save his demand, where he cannot otherwise do it; his contract in the bill or note, having failed him, as it does in certain cases.

§ 24. If A in London owes B 1000 crowns, to be paid in Paris, then worth 6000 livres, and draws a bill to pay 6000 livres in Paris; and that is protested and comes back to A; and when 6000 livres are worth 1100 crowns; A must pay 1100 crowns, difference of 100 crowns is the exchange.

§ 25. *Note on demand.* One was endorsed 2½ months after its date, the holder sued it against the maker, and he was admitted to prove he paid it to the payee before it was endorsed. But there is no time fixed for the dishonour of such a

note; no time of payment mentioned in a note it is payable immediately, or on demand. See s. 45, Post. CH. 20.  
Art. 20.

§ 26. *Accommodating endorser.* A endorsed the note for the maker's accommodation, and without consideration. Held, it was binding on A after due notice, though the plt. knew the fact when he took it. But otherwise, if any fraud in the case, and that known to the plt. So if the plt. buy such note at discount, he will not recover more than he gives for it of such an endorser. Innocent endorsee may recover a fraudulent note, Ch. 192, a. 8; 2 Caines 343; 4 Cranch 141; 1 Taunton 224, Ch. 20, a. 10, s. 57. 7 Johns. R.  
361, Brown  
v. Mott & al.  
—5 Cranch  
49.—1 Esp.  
N. P. 261.—  
3 Do. 46.

§ 27. *Note made in another state.* One was given in Connecticut and endorsed; but in that state a promissory note is not negotiable. Yet held, the endorsee could sue it in his own name in New York against the maker, see 4 Cranch 46. But possession alone does not entitle one to sue in his name if to order, 7 Cranch 160; 1 Ser. & Raw. 180. 1 Johns. Cas.  
139, Lodge v.  
Phelps —  
2 Johns. R.  
198.

§ 28. *Where the drawer is not liable for monies paid.* As where A accepted a bill drawn on him, and the endorsee without demanding it of the acceptor, or inquiry after the drawer, demanded it of the first endorser who paid it, and charged the amount in account with the acceptor, then this first endorser sued, as payee the drawer for monies paid &c. to his use, and offered the bill in evidence. Held, the drawer was not liable. Endorsement without recourse to the endorser, a note is not evidence of money had and received by him to endorsee's use. 2 Johns. Cas.  
75, Munroe &  
al. v. Eastor.  
  
7 Cranch 159.

§ 29. *The endorser suable immediately on a bill protested for non-acceptance &c.* As where a foreign bill of exchange was protested for non-acceptance, and due notice thereof given; held, the holder might sue either drawer or endorser, or both, and need not wait a protest for non-payment; also recover the twenty per cent. damages in New York, with the usual interest and charges of protest. But on a bill drawn in England, and there payable, the holder in America can recover but five per cent. interest, as it is drawn and to be settled by the law of the place where drawn, nor can the acceptor, when sued, object to a protest for non-payment, that it does not state the demand was made on him personally. It is enough it states it was demanded at the place where accepted to be paid, and where the party's liability is fixed by non-acceptance and due notice thereof; it is not material the demand of payment is a day too late—also 8 Mass. R. 460, *Lenox v. Cook*. Broker believed he notified &c., 1 Day's R. 11. 4 Johns. R.  
144, Wilden  
& al. v. Buck.  
See ante.—  
Chitty on  
Bills 220.—  
3 East 481.  
—Ch. 20, a.  
9, s. 3, but  
183, Foden  
v. Sharp.—  
Stra. 949—  
Dougl. 154.  
  
5 Johns. R.  
375, Miller v.  
Hackley.

§ 30. *What is good notice further.* A and B drew a bill in New York, on C and D residing there. A and B, in fact, 1 Johns. R.  
294, Chap-  
man v. Lips-  
combe.

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resided at Petersburg, in Virginia ; bill was protested for non-payment ; the holder seasonably put two letters into the post-office, giving notice of the protest to the drawers A, B, one directed to New York, the other to Norfolk. where he supposed they lived. It did not appear the holder knew where they lived. Held, he had used due diligence, and that the notice was sufficient. Quære, if the holder ought not to have shewn he made proper inquiries to find where they lived.

5 Johns. R. 248, 250, Duryee v. Deniston.—Miller v. Hackley, art. 10, s. 7.—Sayer 27.—12 Mod. 664.—2 D. & E. 713.—Ch. 20, a. 10, 33.—Stra. 1246.—7 East 231, 386.—13 East 417.—1 Johns. Cas. 328.—5 Johns. R. 375.—1 Johns. R. 294.—12 Mass. R. 62.—10 Johns. R. 490, 118, 291.

§ 31. *Waiver of notice.* The endorser of a note regularly notified of non-payment by the maker, fully knowing all the facts, promised to pay the note. Held, this was a *waiver* of want of due notice, and an action lay against him. See a. 10, s. 33, &c. before, and a. 10, s. 5 ; 5 Johns. R. 375, like *waiver* stated. But where several bills were drawn on different places, and under different circumstances, and the endorser said, "I will take care of the bills," or "see them paid." Held, this did not prove an after promise to pay one of the bills on which notice had not been given of non-acceptance ; but such after promise to be a waiver of notice must be explicit, and clearly proved. Same case, 5 Johns. R. 375, *prima facie* evidence of notice, notary's practice and belief. As where a bill drawn at New York, on persons in Baltimore was protested for non-acceptance, the notary testified his practice was in all such cases where endorsers or drawers lived at a distance, to send notice by post of the dishonour &c. to them, and believed he did so in this case. Held, *prima facie* evidence of notice &c. ; and see Pierson v. Hooker, as to waiver. A jury may presume such knowledge from circumstances, Hopkins v. Liswell.

11 Mass. R. 64, Mayhew & al. v. Prince.

§ 32. *Drawer of a bill liable personally, though known to all parties to be an agent.* As where Prince, the deft., was agent of Stephen Higginson jr. at New Orleans, and drew several bills on Higginson, Dodge & Co. in New York, of which house said Stephen of Boston was principal, payable to the plts., and when paid to be credited to him. The deft. signed them with his own name without any qualification. Held, liable personally to the plts., though they were previously informed he drew the bills as agent. The principal did not appear to be the drawer, directly or indirectly.

11 Mass. R. 97, Long v. Colburn.

§ 33. *When one signs as agent a note &c.* Deft. gave a note thus, "No. 272, \$301, Boston, 17th of March 1812. For value received I promise to pay Mr. Edward J. Long or order, on demand, three hundred and one dollars with interest after four months. Pro William Gill,

J. S. COLBURN."

Held to be the promise of William Gill, if Colburn had authority to make the note, and if not, he would be liable to

the promisee in a special action on the case. See Agent, Ch. 20. 9, art. 18, s. 5, &c. *Art. 20.*

§ 34. *Guarantor or surety liable, notwithstanding his declaration to the contrary &c.* Benjamin Bird gave his note to the plt. for a valuable consideration; a few days after, the deft., Abraham Bird, signed his name blank on the back of the note; he signed his name to make the plt. easy, (plt. not present,) but would not be accountable for a farthing on the note. Held, deft. was liable as an original promiser. The estate had been conveyed to Benjamin Bird, and the matter settled several days before the deft. so endorsed his name; deft. contended his promise was to pay another's debt, and so void, because not in writing, if any promise at all, and no evidence of a consideration. Held, as the plt. conveyed the estate expecting his security of the deft. on the note, and that his endorsement had the same effect as his signature upon the face of the note, under the name of B. Bird would have, in which case the deft. would be surety &c. And the deft.'s endorsing proved he, previous to the sale of the estate, consented to join in the security to aid his brother in the purchase. On the whole the deft. was viewed as signing as surety at the date of the note, and so suable as an original promiser. Had he not been thus originally a party to the contract, he would have been a guarantor.

11 Mass. R. 436, *Morris v. Bird.*

§ 35. Notice to the endorser at the proper time and place is sufficient, though it state the note fell due three days before, and though the maker's name was not mistaken in the notice, as it was proved the endorser was liable on no other note payable at this bank.

12 Mass. R. 6, *Smith v. Whiting.*

§ 36. *A note is not functus officio*, lodged as security and returned. As when Cutts gave his note to Clark or order, and he endorsed it to Carlisle, his custom-house surety, as his indemnity, Carlisle endorsed it in blank and returned it to Clark on receiving other indemnity. Clark passed it to the plt., who sued the maker, as endorsee of Carlisle, and recovered; but had Clark paid the note to Carlisle and taken it up, it had been *functus officio*. 2 Phil. Evid. 14.

12 Mass. R. 78, *Emerson v. Cutts.*

§ 37. *The maker of a note dies &c.* Endorsee *v.* Endorser, the maker died, and administration on his estate before the note falls due. A demand on the administrator is not necessary in order to sue the endorser if he have due notice of the death and non-payment, except it fall due above a year after the administrator is appointed.

12 Mass. R. 86, *Hale v. Burr.*

§ 38. *Endorser liable to his immediate endorsee*, for monies had and received, and the note is evidence, and if the maker appoint a place to be notified at, notice left there is sufficient to charge the endorser, see art. 10, s. 20. And if a note be pay-

12 Mass. R. 172, *State Bank v. Hurd.*  
—12 Mass. 403, *Woodbridge & al. v. Brigham & al.*

CH. 20. able at a bank named, no demand on the maker is necessary,  
 Art. 20. timely notice to the endorsers of non-payment is sufficient.  
 13 Mass. R. 55.

12 Mass. R.  
 502, Hurd jr.  
 v. Little.

§ 39. *If the holder of a bill take security of the drawer and give not further time &c., endorser is held.* As where the holder of a foreign bill of exchange protested for non-acceptance, demanded and received collateral security of the drawer of it, then expecting the drawee to pay a large part, the holder gave up such security, but gave no further time to the drawer. Held, the endorser remained liable for the balance due on the bill.

1 Johns. Cas.  
 107.—4 Johns.  
 R. 27.

§ 40. *Bill remitted to pay an antecedent debt,* and is returned protested, is entitled to no damages in New York, (twenty per cent.)

1 Johns. R.  
 64.—4 Johns.  
 R. 235,  
 Thompson v.  
 Ketcham.—  
 2 Burr. 1078.  
 —2 Johns.  
 R. 94.

§ 41. Note made in France, not stamped according to law there, but payable to a person in New York, is valid. And where a promissory note is made at Jamaica and payable in New York, it is governed by the law of New York, and where no place of payment is named in a note it may be proved by parol evidence at what place it was agreed it should be paid.

4 Dallas 234.

§ 42. *Forged drafts.* Payment of cannot be recalled, but quære.

8 Johns. R.  
 79, 82, Ar-  
 nold v. Crane.  
 See Wilson  
 v. Force, Ch.  
 32, a. 4, s. 21.

§ 43. If A lend B money, and he gives A his note; and then B gets the note into his hands by fraud and keeps it, A may recover the money on the money counts, being immediate parties to the loan and consideration. So A may recover in like manner if B receive such a note on his promise to convey property to A &c., and fails to do so, and refuses to return the note; for in this case too he gets the note by fraud.

7 Johns. R.  
 321, Jerome  
 v. Whitney.  
 3 Johns. R.  
 484.—  
 10 Johns. R.  
 418.

§ 44. A gives a note B to pay \$60 in neat cattle, for value received, this note is not within the statute; and the consideration must be shewn. But *value received* is *prima facie* evidence of consideration; if the plt. however, states in his declaration specially in what the value received consisted, (instead of saying generally it was made for value received,) he must prove the special consideration, as averred by special evidence. 10 East 431, 437, Knill v. Williams.

12 Mass. R.  
 450, Thayer  
 v. Brackett.  
 See 2 Phil.  
 Evid. 17.

§ 45. *Note on demand, endorser discharged &c.* As where a negotiable note payable on demand, was endorsed ten months after its date, the endorsee neglected four days to demand payment of the maker, and for three months to notify the endorser of non-payment. Held, he was discharged. Parties lived within three miles of each other; see s. 25; 2 Caines 369; 1 Johns. R. 319; 1 Ed. Raym. 217.

12 Mass. R.  
 281, Mowry  
 v. Todd.

§ 46. *Where the transferee of a note not negotiable may sue the maker.* June 8, 1813, at Portland, Todd gave his written promise to pay his part of a ransom of a vessel by

Samuel Fisher, being \$261 61 with interest, when said ransom was to be paid: on the back, "For value received, I hereby transfer all my right and interest in the within promise, being myself solely entered, to Jabez Mowry;" but not signed by Fisher, but the intent was to make the transfer. Judgment for Mowry against Todd, he having recognised the transfer and promised to pay the contents to Mowry; for the equitable interest was assigned to Mowry, and the deft. made an express promise to him.

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Art. 20.

§ 47. The endorser of a promissory note in Virginia, who endorses it to give it credit, though *counter secured*, is not liable on it, or for money had and received, except the plt. endorsee first shews the maker is insolvent, or that he has sued him to no purpose. It is not sufficient to show he is not within the reach of the court's process. See a. 15, s. 8.

6 Cranch  
333, Dulany  
v. Hodgkin.

Error to the Circuit Court, Columbia &c. assumpsit. Nov. 1809, A, B, C, & D, being concerned &c. two of them wrote to E, directing him to buy some salt for A, B, C, & D, 10 to 30,000 bushels, and to draw on them for the amount; E purchased and drew on them. Held, 1. they were bound to accept and pay his bills, and if they refused, and he paid his bills, he had his action against them for their amount, and damage and costs of protest on his count for money paid, and on it said bills were evidence. 2. If after protest E sold the salt without order, it did not prejudice his right of action, though he did not account for the sales.

7 Cranch  
500, Riggs v.  
Lindsay,  
cited 2 Phil.  
Evid. 33.—  
Peters R. 262.

§ 48. July 9, 1793, deft. in London, drew bills on Boyd & Co. in Paris, for 71,000 livres T., equal to £603 19s. 10d. sterling, according to the then rate of exchange, payable to the plts., who in London endorsed them to Jeyssit & Co. at Amsterdam: they endorsed them to Meryolet there, and he to Androine at Paris. When presented at Paris, were refused acceptance by Boyd & Co. though they promised to pay. In the mean time, the French convention forbid bills drawn in enemies' countries to be paid. The bills were not paid, of course, and sent back by Androine to Meryolet, at Amsterdam, and protested for non-acceptance and non-payment. Held, the drawers were liable for the whole *re-exchange* between London and Paris, though in this *circutious* route. Verdict, £913 4s. 3d. and the French decree, forbidding payment, made no difference; for they engaged the bills should be paid, and it was not necessary for the holder to enquire for what reason they were not paid; and the drawer becomes liable to all the consequences of non-acceptance and non-payment. When the first bill was drawn in London the exchange was computed, and when Androine re-drew in Paris, he computed the *re-exchange*, which, with some small expenses, had varied from £603 19s. 10d. to £913 4s. 3d.

2 H. Bl. 378,  
379, Mellish  
& al. v. Sim-  
eon.

## CH. 20.

## Art. 21.

2 H. Bl. 336,  
DeBirdt v.  
Atkinson.  
Maker of a  
note insol-  
vent.—Ch.  
20, a. 10, a. 57,  
seems con-  
trary—and  
several cases  
4 Cranch,  
141 to 163.

And see 12  
Mass. R. 89,  
Farnum v.  
Fowle.

§ 49. This was assumpsit, by the *endorsee*, of a promis-  
sory note against the *endorser*, drawn by one Brown. The  
facts were, when the deft. endorsed the note, he received no  
consideration, and knew Brown, the maker, was *insolvent*,  
and the defendant gave no value for it, but “lent his name  
merely to give credit to the note.” Deft’s. first objection,  
want of notice; second, no due demand on the maker; third,  
“as the deft. received no benefit from the transaction, he  
ought not, in justice, to be charged with the payment of the  
note.” Judgment for the plt. and the court held it was not  
necessary to prove a demand on the maker, immediately  
after the note became due, or notice given to the endorser of  
the maker’s refusal to pay. Justice Buller observed, “it has  
been said, the *insolvency* of the drawer does not take away  
the necessity of notice. That is true, where value has been  
given, but no farther. Here, it is plain that Atkinson lent his  
name, merely to give credit to the note, and was not an en-  
dorser in the common course of business. It is no answer to  
say he received no benefit, he never meant to receive any.”  
This endorser was in the situation of three fourths of the en-  
dorsers at our banks, who have invariably been considered as  
entitled to notice.

ART. 21. *Select principles in pleading as to them.* § 1.  
As to pleadings or declarations, pleas &c. on this head, gene-  
rally, see American Precedents, in print, &c. Kyd on bills;  
Chitty on the same subject; Story’s Pleadings, &c. &c. in  
which books there is a sufficient number of good forms.

§ 2. In declaring on bills, notes or checks; bank notes or  
drafts; the true principle, generally, is to declare according  
to the facts, as they will appear in evidence; and the effect  
in law.

§ 3. In these cases there often are two grounds of action:  
1st the bill or note, check or draft itself; that is, the contract  
expressed in it. In this case the declaration is on the instru-  
ment itself. 2d the *original consideration* for which the in-  
strument was given. The common or money counts, or some  
of them, constitute this second mode of declaring; both may  
be in the same action.

8 T. R. 648,  
Osborne v.  
Noad.

§ 4. There ought always to be a count on the instrument;  
as in case of default, it is the measure of damages. And it is  
a special contract taken by the party as his security; and as  
a *special* contract, generally, excludes an *implied* one, it is  
only in special cases, the plt. can leave this *special*, and resort  
to an *implied* contract or promise. See Ch. 9, a. 22.

Ld. Raym. 88.  
—4 T. R. 155.

§ 5. Though usual, it is not necessary to state, or to refer  
to the *customs of merchants*, in these declarations; for this  
is a public usage, of which courts, *ex officio*, take notice; nor



to refer to the 3d & 4th of Anne for the same reason ; nor to state a *consideration*, in declaring on these instruments, for one is implied, though usual to state a consideration, as *value received*, &c. ; nor to make a *profert*, for it is no deed, or specialty.

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4 T. R. 338.

But any *variance*, between the contract and the declaration is fatal, though even stated under a *videlicet* ; as the very same written contract declared on, must be produced in evidence, or the one produced does not support the declaration ; they, however, are the same, when *the substance and legal effect are the same* ; though often, if particulars are stated that might have been omitted, they must be proved. It is a material variance, to mistake a party's name. But if a note be written *never to pay*, it is correct to declare on it as a note to pay : holder waives a doubtful acceptance. 6 East 199.

Dougl. 664,  
Bristow v.  
Wright.—  
Cowp. 600.—  
3 T. R. 178,  
335.—4 T. R.  
166, 660 —  
1 Bos. & P.  
281.—1 Johns.  
R. 96.—2  
Atk. 32.

See before.

§ 6. A bill payable to a *fictitious payee* or order, is in fact payable to *bearer*, and may be declared on accordingly, against every party aware of this circumstance when he put his name to it.

§ 7. Whenever a plt. declares on a *contract*, it is essential for him to shew it ; also, to state in his declaration, how he and the defendant become each a party to it ; and if a bill or note, whether as payee or endorsee, drawer, acceptor, or endorser. And when any act is done *per alium*, it is best so to state it. So to state an *express promise*, whenever made ; and if not so made, then the facts that make a good ground of a promise, and a promise ; as in such case the law raises one. But if the plt. do not aver this implied promise, arising from the deft's. legal liability, the court and jury will understand it, if he truly state the facts whence it arises, and the deft's. liability.

Salk. 128,  
Starling v.  
Cheesman.

§ 8. *The legal operation may be contrary to the words of a contract.* As where one Collins made a note, payable to the plt. or his order ; the plt. endorsed it to the deft. ; he *re-endorsed* to the plt. The court said the plt. might have proved that he was named *payee, and endorsed, as a mere matter of form* ; and then the deft. would be the only real endorser, and would have no cause of action against the plt. as a prior endorser ; but also, that the plt. should so have declared, if the agreement was so, as his counsel alleged it was ; but as the record stood, the declaration being according to the words of the note and endorsements, the plt. could not have judgment ; as it would be, evidently, against a *subsequent* endorser, who would sue the plt. as a *prior* one, and a *circum-* of action be the consequence, this, the law would not allow.

4 T. R. 470,  
Bishop v.  
Hayward.  
cites 3 T. R.  
481.—H. Bl.  
569.—Bul. N.  
P. 320.

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1 East, 432.

—4 T. R. 616.

§ 9. So a note payable *to my order*, may be declared on, as a note payable *to myself*, if I do not order it to be paid to another. 5 East 476, *Smith v. McClure*.

§ 10. So a note payable to a married woman, may be declared on, as payable to her husband; as this is the legal effect.

12 Mod. 345.

—Doug. 632.

*Peacock v.**Rhodes*.—

7 T. R. 596.

—5 East 476.

—Selw. N.

P. 317.—10

*Johns. R. 231.*

§ 11. If there be many blank endorsements, the plt. may declare on them all, and add a count, making himself *first endorsee*; and even an *endorsement in full* may be struck out at the trial. In *Peacock v. Rhodes*, the plt., a *bonâ fide* purchaser of a stolen bill, and third endorsee in blank, struck out all but the first endorsement, and sued as first endorsee; and recovered. The endorsement supposes the delivery of the bill or note. 3 *Johns. Ca. 259*; 13 East 135. n.

7 East 231,

*Lundee v.**Robertson*.—

Selw. N. P.

317, *Lindo v.**Burgos*.—

Doug. 629,

*Rushton v.**Aspinwall*.

§ 12. Whenever the plt. sues a *conditional* undertaker, on a note or bill, as an endorser or drawer of a bill, or endorser of a note; he must allege a due demand on the real debtor, as the acceptor of the bill, or maker of the note, and *due notice* of his failure to the deft., as he engages, only on condition these things be done; or the plt. must *state* some sufficient reason, as above, why these things have not been done; or shew, in evidence, the deft. has waived them, by promising to pay, &c. knowing all the facts of the case: such demand and notice are matters of substance, and the want thereof is not cured by verdict. In *Lindo v. Burgos*, the declaration stated the demand on the acceptor, four days too late, and held bad; and in *Rushton v. Aspinwall*, when the bill was drawn, and held to be a nullity.

Selw. 318.

§ 13. *Both grounds of action*. When the action is brought between the *immediate parties* to the bill, it is usual to add such counts as will embrace the *consideration for which it* has been drawn; for as the bill, a *simple* contract, as between these parties, does not merge this *consideration*, or *original demand*; the plt., if he fail to prove his special count on the bill, may resort to evidence on his common counts. This the plt. may always do, if he fail to prove, and it does not appear any *special contract* was ever made. But if it appears such a one was made, but void, by some law; then, also, generally, he may resort to his common count, to recover this demand.

7 T. R. 241.

—Selw. 318,

*Alves v.**Hodgdon*.

§ 14. As where the plt. declared on a written contract made in Jamaica, void for want of a stamp; and on a *quantum meruit*, the court held he might recover on the *quantum meruit*.

Selw. 318,

*Tyter Jones*.

—1 East R.

58.—3 T. R.

174.—1 Taun.

363.

§ 15. So where a promissory note had been given for *money lent*, the note, not being stamped, was void. Lord Kenyon allowed the plt. to recover on his count for *money lent*, by

the plt's. proving that when the money was demanded of the deft., for which the note was given, he acknowledged the debt. In neither of these cases could the written contract be received in evidence. CH. 20.  
ART. 21.

§ 16. But in *Rolleston v. Mebbert*, where the plt. took a defective bill of sale of a ship at sea, the court held, that though this failed them, they could not resort to their common law liens. Our courts do not take notice of foreign stamps. *Randall v. Rensselaer*; but 2 Johns. R. 423, act of Congress. 3 T. R 406,  
and 1 East  
58.—1 Johns.  
R. 94.

§ 17. So the plt. need not declare on a *promissory note*, but may for *money lent*, and give the note in evidence; but not if he take a bond; for a specialty or deed merges the consideration. The 3 & 4 Anne only adds a further remedy, and does not take away that which before existed, at common law. A note is valid, though stamped with a stamp of superior value. *Robinson's case*, 2 Burr. 1177. Bull. N. P.  
137, *Story*  
*v. Atkins*.—  
1 Stra. 719,  
726, same  
case.

§ 18. But if there be a note or bill, and the deft. is discharged by the plt's. laches or want of due diligence, as to demand of notice, or is discharged by alterations in either &c. the plt. will not be allowed to resort to his common counts. And, generally, where a *valid* note or bill has existed, it must be relied on. And, also, where there is no *privity* between the plt. and deft., as where an endorsee sues, the original consideration of the bill or note is no ground of action. There is no *privity* between the acceptor and endorsee of a bill, or the maker and endorsee of a note. *Chitty on Pl.* 10. Chitty 284.—  
3 Esp. 155.—  
4 Esp. 159.

§ 19. But in *Grant v. Vaughan*, where the defendant gave a cash note thus: London, Oct. 22, 1763. *Pay to ship Fortune, or bearer, £500.* Directed to one Asgill, the deft's. banker; and this note was to one Bicknell, a husband of a ship of the deft. Bicknell lost the note: A found it, and four days after it was payable, in London, came to the plt's. shop, at Portsmouth; and he, *bonâ fide*, bought the note, and for a valuable consideration. Deft. finding the note was lost, sent word to Asgill not to pay it. The plt. sued, and his first count was on an *inland bill*: his second, *assumpsit for money had and received*; and on this second count, he recovered; and the court held (sixth point in the action) clearly, this action lies for money had and received, in favour of the bearer, *bonâ fide*, of a bill or note, payable to bearer. Judgment for the plt., Grant, upon the ground, if A draw a bill or note in favour of a bearer, it is evidence of money had and received to the bearer's use. Yet, what *privity* is there between the bearer and drawer of such a note? And also, that it is a question of law, whether a note or bill is negotiable or not; that Bicknell, himself might undoubtedly have brought this action; and now the bearer may bring it, as for money re- 1 East 98.  
*Johnson v*  
*Collings*.—3  
East 177.

3 Burr. 1516,  
*Grant v.*  
*Vaughan*.

See 13 John.  
R. 238.

See Ch. 1, s. 1.

CH. 20. ceived to his use. Many cases were cited by the court, in  
 Art. 21. support of this action.

The modern rules of proof, as to lost bills, notes, or checks which are sued. 2 Phil. Evid. 15, 16. The plaintiff, who sues on a note, as *bearer*, must prove the maker's hand-writing, and the endorsements he states in his declarations; and if the note has been lost or stolen, and afterwards negotiated, the holder must shew, if he has received notice of such proof being required, that he received it *bonâ fide*, for a valuable consideration, cites Grant v. Vaughan, and Peacock v. Rhodes. Phillips adds, if the plt's. title, as holder, is brought into suspicion by his witness, he must prove the consideration, though no notice has been given to that effect; but if no suspicion arise on the plt's. case, he will not be obliged, even after notice, to prove the consideration, until it has been impeached, cites 4. Taunt. 114, &c. When the plt. has established a *primâ facie* case, then it remains for the deft. to impeach his title; and until he has made the title suspicious, by shewing that the note was lost, or obtained by force or fraud, he cannot, merely by giving notice to prove the consideration, cast the burden of proof on the plt., but the deft. cannot produce evidence to impeach the plt's title, without having given previous notice to him of such intention. Dunlap says, the general rule is, that the endorsee, or holder, of a bill or note, payable to bearer, or endorsed in blank; or of a check, is *primâ facie*, to be deemed the rightful owner of it, and he need not prove his title to it, unless circumstances of suspicion appear, as that it has been lost, or stolen, &c. cites Miller v. Race, 1 Burr. 452, fully stated, Ch. 76, a. 2, s. 10; case of a bank note lost by robbery, the *bonâ fide* receiver of it recovered against the bank, in trover, as for money; cites Cruger v. Armstrong & al. 3 Johns. Ca. 5 was a case of a check, sufficiently stated, Ch. 50, s. 16; cites too, Conroy v. Warren, there stated; 13 Mass. R. 160 was the case of Brown v. Gilman & al. sufficiently stated Ch. 20, a. 8, s. 2, cited 2 Dallas 146; cites also, 6 Mass. R. 453, was Bayley & al. v. Taber & al., sufficiently stated, Ch. 20, a. 11, s. 11; 5 Bin. 479, Holme v Karpser. What is cause of suspicion is in each case a question of evidence.

On the common counts, a note payable to bearer, is evidence (2 Phil. Evid. 16) of money had and received by the deft. the maker, for the plt's. use, 12 Johns. R. 90, Pierce v. Crafts, need not prove any debt due from the maker to the bearer, other than the note proves.

§ 20. In this case the court would not allow the acceptance of a bill was evidence of money had and received to the holder's use on such a count by an endorsee against such acceptor. See Ch. 9, a. 2.

1 East 104,  
 Johnson v.  
 Collings.

§ 21. In this case of a bill drawn by Levisy & Co. in favour of John White, the drawers knew he never existed. It was held, an innocent endorsee, for a valuable consideration, might recover against the acceptor, knowing the payee was a fictitious person, as on a bill payable to bearer, but not as for money paid &c. by this endorsee to the use of the acceptor. Though this last point was not expressly decided, it appeared to be the opinion of the court; and p. 602, Eyre C. B. said, it must be a very special case to support such assumption.

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Art. 21.

1 H. Bl., in  
Gibson v.  
Minet 569 to  
625.—3 East  
177.

§ 22. A owing B for brokerage, and B owing C for money lent, B directed A to pay what he owed him to C, as a security, thereon C lent B a further sum. A accepted B's order, and then refused to comply with it. Held, C might sue A for money had and received, and Gould J. said, "if my debtor tender me money which I give back to him, and tell him to pay it to another, he then, in point of fact, receives money to the use of the other." Wilson J. dissented as to money had and received, and thought no action would lie for money had and received, but where money had been actually received. As to averring second and third not paid &c. Salk. 130; 1 Ld. Raym. 810; 1 Cranch 418, 419.

1 H. Bl. 239,  
Israel v.  
Douglas.—  
2 Phil. Evid.  
14, 15. See  
Ch. 9, a. 18,  
s. 6, 9.—  
12 Johns. R.  
276.—14 East  
582.

§ 23. One partner may endorse a note given to the partnership, in the partnership name; and thereby assign the interest of it to himself, and in his own name may maintain an action against the maker of the note on such an endorsement, but it is conceived not against the endorsers, as in that case the plt. would be named one of the defts.

1 Caines' R.  
506, Kirby v.  
Cogswell.

§ 24. *A subsequent promise* by the deft., whether drawer or endorser to pay, is evidence of presentment to the maker or drawee for payment, and of notice to the deft.; then no special count is necessary. If in making a note the date be mistaken it may be corrected in the declaration.

7 East 231,  
Lundie v.  
Robertson.—  
Chitty 366,  
344, 371.

A note made by an agent may be stated to have been made by the principal, as that is the legal operation, or by D by one E, his agent in that behalf on — at — made &c., And if by an agent it is fatal to declare the note or bill was subscribed by the hand of the principal. So "under their hand," if signed by one deft. for himself, and as agent to the other, the variance is essential; but this *dictum* may be doubted as to him who acts by an agent, the rule applies *facit per alium facit per se*.

1 H. Bl. 313.  
—6 T. R. 669.  
—12 Mod.  
346.—Chitty  
345.

§ 25. If the endorsee of a bill discharge the acceptor, having no funds in his hands of the drawer, this is no plea in an action against him.

6 Mass. R. 86,  
Sargent v.  
Appleton.

§ 26. *Defence.* All the actions on bills &c. are founded on contracts. 1. The grounds of defence; defective statements of the cause of action in the plt's. declaration, in regard to

CH. 20. which the deft. may plead various pleas in abatement, or demur specially for want of form in the declaration, or demur generally, because it is not sufficient in substance to entitle him to judgment. Numerous indeed may be the pleas and demurrers on these grounds, but in practice they long have been very few. The plea generally is, that the deft. never promised, though there may be special pleas, as accord and satisfaction, payment, statute of limitation, bankruptcy, tender, infancy, alienage, discharges under insolvent acts, a release, &c. found under their respective heads, or among pleas in assumpsit generally,

§ 27. The deft. may deny, that the instrument declared on was ever made or accepted, or endorsed, or that the deft. was ever party to the contract, or that the payment of the bill or note was ever demanded of the acceptor or maker; or if it was, that notice was never given thereof to the deft., that the contract was void or voidable for want of capacity in the deft. to contract, because a minor, married woman, &c. So the deft. may deny there was any consideration or aver it was illegal; so the deft. may deny the plt. is able in law to sue, because outlawed, an alien enemy or a bankrupt &c. So the deft. in his defence may allege a set-off, a former recovery &c.

§ 28. Many of these matters of defence are only in evidence, as whenever the deft. denies the bill or note was made accepted or endorsed at all, or in a manner legally binding; but whenever the deft. admits there was once a legal contract, and means to defend himself by saying it has been performed or discharged, this matter he may plead specially, though not often necessarily so, as the plea never promised forces the plt. to prove his right of action, and this right is often gone by payment and performances in other ways.

§ 29. Where a right of action once existed and has been specially discharged, as by bankruptcy &c. The matter of defence must be pleaded because discharged by matter in law, and so to be pleaded.

§ 30. In general, evidence in this case is the same as the evidence in other cases of simple contracts. There is, however, some evidence peculiar to bills and notes, and negotiable contracts in regard to considerations, demands of payment, notices and protests, damages, exchange, reexchange, &c. most of which has been noticed already. The evidence as a general rule must be according to the issue joined; to support an action against the acceptor of a bill or the endorser of a note, the hand writing of the drawer or maker need not be proved. The acceptance of a bill may be verbal or in writing; and if by an agent his authority must be proved, and to this purpose he is a witness. If one or more accept a bill condi-

tionally, his or their hand writing must be proved if disputed, and the condition must be proved to have been performed or the conditional event to have taken place : and if a bill or note pass by delivery only, as when to bearer or endorsed blank, the delivery must be proved, and generally possession is this evidence.

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§ 31. The endorsee must prove the signature of each endorser he claims under, even against the acceptor, for it is only by valid endorsements such endorsee is entitled to the bill or note, and if the acceptor saw the endorsement, or a drawer drew the bill payable to his own order, and himself endorsed it, it makes no difference. But the plt. need prove only such endorsements as he declares upon in his declaration, or insists on at the trial. An endorser by his endorsement admits the signatures of the drawer and of prior endorsers. As the law presumes the acceptor has a consideration for his acceptance it is incumbent on him to prove the contrary, and each one by signing admits all the prior signatures necessarily on the bill or note, if he sign seeing the bill or note.

1 T. R. 664,  
Smith v.  
Chester.—  
4 D. & E. 30,  
31.—Peake  
20.—2 Phil.  
Evid 27.

Salk. 127.—  
3 T. R. 163.

§ 32. *A party to the bill or note when a witness or not.* In this case the court laid down the principle very extensively, and held, that a person is not a competent witness to impeach a security to which he has given currency, and Lord Mansfield said, the rule is, "that no party who has signed a paper or deed shall ever be permitted to give testimony to invalidate that instrument which he hath signed," though he is not interested in the event of the suit. This is the broadest ground that has been taken to exclude as a witness a party to a paper. It is admitted to be a rule founded on public policy ; but in the above case it was carried further than the reason of that policy goes. Hence, the broad rule in this case has been continually narrowed more and more by subsequent decisions. The leading idea was in *Walton v. Shelly*, that every man who is a party to an instrument gives credit to it.

1 T. R. 206,  
304, *Walton*  
*v. Shelly*  
See Ch. 90,  
a. 10.

§ 33. Since the above decision it has been held, that in an action by an endorsee of a bill against the acceptor, the payee, become endorser, is a witness to prove the bill originally void ; as that it was made in London instead of Hamburg, and so void for want of a stamp.

7 T. R. 62.  
*Jourdain v.*  
*Lashbrooke.*

§ 34. So if the endorsee sue the acceptor, the drawer is a witness to the acceptor's signature, though the defence be forgery. So in such an action the drawer of a bill payable to his own order is a witness to prove usury in discounting the bill ; yet by his name he has sanctioned the bill, and the plt. is endorsee.

4 Esp. 82.—  
Chitty 306.—  
5 Esp. 119.

§ 35. If the endorser of a note receive money from the maker to take it up, he is a witness for the maker sued by the

7 T. R. 601.—  
Chitty 304,  
305.

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Chitty 306.

Mass. R. 564.  
1 D. & E. 654,  
Smith v.  
Chester.

3 Mass. R.  
27, 28, War-  
ren v. Merry.  
Like case  
10 Johns. R.  
231.—  
11 Johns. R.  
128.

3 Mass. R. 31.  
Brown v.  
Babcock.

3 Mass. R.  
225, Rice v.  
Stearns.

3 Mass. R.  
665, Parker  
v. Lovejoy.

4 Mass. R.  
156, Church-  
hill v. Suter.

endorsee, to prove it paid by such endorser, as he is liable to the plt. on the note if the action be defeated, or to the deft. for money had and received, if the action succeed, and his being liable in the latter case to compensate the deft. for the costs incurred in the action by such non-payment makes no difference. And in an action against the maker of a note, the endorser is a good witness to prove it paid. *Endorsee v. Endorser*, maker admitted to prove the note altered.

§ 36. The cases in England on this point have varied much from one point to another, and on the whole they are essentially different from the decisions on the same point in the United States. Hence, it is most important to attend to the American decisions.

§ 37. The Supreme Judicial Court in Massachusetts in this case held, that the acceptor of a bill of exchange is estopped to deny the handwriting of the drawer, but not of the first endorser, though his name was on the bill when accepted, but not necessarily so.

§ 38. In this case the Supreme Judicial Court of Massachusetts decided, that a party to a negotiable security shall not be a witness to prove it void at the time he gave it currency; but that he may be admitted to testify to any fact happening afterwards, if not interested in the suit. In this and other cases this court has confined the rule to negotiable paper, and to facts existing when the party has sanctioned, by his signature the instrument, and neither the reason or policy of the law will justify any other rules. The plt. was endorsee.

§ 39. In this action *Parsons C. J.* said, "the rule, that a man shall not be permitted to invalidate his own endorsement, is confined to negotiable securities, and in those cases he may, if not interested, testify to any facts, excepting such as may prove the security void at the time of his endorsement." Hence, he may testify to prove it valid.

§ 40. An endorser of a note not liable as such, is a good witness to prove its execution; for he is not called to invalidate an instrument he has put his name to, but to confirm it, and this is altogether consistent with his endorsement.

§ 41. In this case also it was resolved, that the payee and endorser of a note is not a witness to prove it usurious, in an action by the endorsee against the maker, as his testimony would be to destroy his own contract or an instrument he had sanctioned as true and genuine, and by reason of a fact existing at the time of his sanction.

§ 42. The very same decision on the same principles was made in this case by the whole court, as was made in the above case of *Parker v. Lovejoy*; *Mann v. Swan*, 14 Johns. R. 270.



§ 43. In the Sup. Court of Pennsylvania, it has been decided, that in an action of the endorsee against the maker, an endorser is not a witness to prove that there was no original consideration for the bill

§ 44. And the same point has received a similar decision in Connecticut, in *Allen v. Holkins*; in Virginia, and in New-York.

§ 45. Forbearance of a suit for twenty years will, in equity, be a good bar, though between merchant and merchant; as this common presumption applies to mercantile as well as to other contracts.

§ 46. The *endorsee* sued the maker of a promissory note: he plead, it was made and endorsed in blank and given to one Levi Thaxter, to secure a loan made to the deft., by Thaxter, and that Thaxter had not assigned his interest but remained the real creditor in the action, *hoc paratus*, &c. then plead *usury*, taken by Thaxter, on this note on the loan to the deft., and tendered his oath, &c. On demurrer, judgment for the plt.; plea bad, for part is triable by jury, and part by oath on the statute; and the oath can be admitted only between the creditor and debtor: so is the statute.

§ 47. If the endorsee sue the drawer of a foreign bill, the deft. may plead or shew the plt. holds it as the *agent of the payees*, and that they had requested the drawer not to pay it to him; and if the payees endorse a bill to A, to collect it as the agent of the payees, and A endorses it to B in trust for the payees, A not to be liable; A is a witness to prove the trust, and to defeat B's action against the drawer, desired, by the payees, real owners of it, not to pay it.

Neither a bill of exchange, or its endorsements, are within the statute of *frauds*; nor are they *specialties*; nor to be explained by *parol* evidence, where there is no *latent* ambiguity, though simple contracts; "because the written terms of the contract are better evidenco of its intent, than any *parol* explanation; but *parol* evidence is admissible to contradict a simple contract, as to shew no value received, on a note expressed to be for value received; or to shew the written contract does not contain all the agreement. So it may be proved the plt. did not receive this bill as *assignee*, but only as *agent of the payees*. This endorser was admitted as a witness not to impeach a negotiable contract, but to prove, that when he endorsed it, there was a *trust, not expressed in his endorsement*. Letters written by the payee to the maker when the note is dated, are evidence to prove usury, in an action by the endorsee against the maker; *secus* since 56 Geo. III. Ch. 93.

§ 48. Eliph. Butman gave his note to the plt. for \$100 payable to him or order. The deft wrote his name blank on

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2 Dallas, 194,  
Stett v.  
Lynch.  
1 Day's R.  
17.—Chitty  
306.—1 Cain.  
R. 258.  
Watson on  
partnership,  
304.

6 Mass. R.  
190, Binney  
v. Merchant.

6 Mass. R.  
430, Bathur  
v. Prentiss.

2 Phil. Ev.  
13.

7 Mass. R.  
233, Ulen v.  
Kittredge.—

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See Hunt v. Adams, Ch. 11, a. 13.—  
A bill issued in blank as to payee, the fair holder may insert his name.—  
3 Maule & Sel. 90.  
7 Mass. R. 479, Tyler v. Binney.

the bottom of it, as guarantor, and *verbally* authorized another to write a sufficient guarantee over the deft's. name. Plt. declared in consideration of his forbearance till he returned from sea to sue. Butman, the defendant, promised to guarantee the payment of the said note. Judgment for the plt. and *parol* evidence to prove such authority. The deft's. signature on the back of the note, with authority to another to write the guaranty; and that being written by him, is a good memorandum in writing within the statute of frauds.

§ 49. The payee of a promissory note endorsed it, "I guarantee the payment of the within note in eighteen months, provided it cannot be collected of the promiser before that time." The holder must prove a title to the note, to recover against the endorser. Judgment against the plt., here is no endorsement to pass the property of the note to him.

8 mass. R. 480, Ruggles v. Patten.

§ 50. There is a minute that if A and B give a joint note, and A pays his part, and the endorsee sues B, it is no plea in bar, for him to state that A has so paid, and has been discharged by the promisee, before the note was endorsed; for it should have been pleaded in abatement on a joint note when one was sued. And if a promissory note be for the payment of money at a day and place certain, it is no plea in bar that the holder of the note was not present at the time and place fixed for payment.

9 Mass. R. 497, Forbes & al. v. Eldridge.

§ 51. A in the United States consigns his ship to B in Ireland, he to insure her and to draw a bill on him payable in London; the bill was accepted; before it became due, the acceptor bought and remitted exchange to reimburse the house in London, for their payment of the bill. The bills thus remitted did not fall due in season for the acceptance, and before due, the parties to them became bankrupt. Held, A was not liable for the loss thus incurred; for the plt. B, in Ireland, accepted the bill on his own account, and not as agent of the American drawer; and it belonged to the plt. to meet the payment according to his acceptance.

5 Johnson's R. 68, Tobey v. Barker.

§ 52. The Supreme Court of New-York held, that a *promissory* note is not payment of a precedent debt, unless there is an express agreement to accept it in payment, and to take the risk of the insolvency of the maker. This was a note given for a part of certain rent, for which a receipt was given *in full*; and *parol* evidence was allowed to prove the note was for part of the rent; also held, that *parol* evidence is admissible to *explain* or *contradict* the terms of the receipt; and this seems to be a general principle in regard to *receipts*.

7 Cranch, 208 Sheehy v. Mandeville.

§ 53. Held 1st, a note payable in 60 days will not prove a count, not stating when payable; 2d *assumpsit* on a promissory note in Virginia, and writ of enquiry; a note must be

produced like the one counted on ; 3d, but need not be proved ; 4th, plt. cannot give evidence the variance is his attorney's mistake.

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§ 54. *An endorser, obliged to take up a note—his remedy against the maker*—may have assumpsit, paying it *after* protest, and for the amount of the note, with costs of protest : 1st count on a note in the common form under the *statute of Anne* ; 2d for money paid &c. ; and 3d a special count stating the whole case. Plea non-assumpsit, and verdict below for the plt. ; deft. moved in arrest of judgment, alleging 3d count was bad ; motion overruled &c. ; error brought by the maker. Judgment for the endorser affirmed, though mainly objected, the count should have been founded *on the note*, so as to oblige the plt. to produce it at the trial ; but the court observed it stated the plt. paid the note, and the court presumed it was so produced.

7 Cranch  
278, Morgan  
v Reintzel.

§ 55. *No set-off on a promissory note, payable at a bank* ; for the maker, by making it there payable, authorises it to advance on his credit to the owner, the sum named in it ; 2d, it would be a fraud on the bank, to set up off-sets against the note, on account of any transactions between the parties. Action was debt by the bank against Mandeville, the maker of the note, endorsed to it. Special verdict found he made it Jan. 15, 1811, *being always an inhabitant of Alexandria*, for a valuable consideration, made it *at said town*, payable to C. J. Nourse, or order, sixty days after date ; *negotiable at said bank of Georgetown*, payable at the bank of Potomac, in Alexandria for \$410,51, negotiated accordingly, protested, due notice, &c. Judgment affirmed with damages, 6 per cent a year, &c.

9 Cranch  
9, Mandeville v. Union Bank of Georgetown.

§ 56. A, one member of a commercial company, gives his promissory note to B, another member of it, to its use ; B, in his own name may sue A, to recover to its use. 2d A declaration is on a joint note, and the defendant pleads it is the separate note of one of the defts., and was given to, and accepted by the plt., in full satisfaction of a debt ; this plea is bad, as it amounts to the general issue. Though this note was given to Forrest, *president of the company* (of four or five hundred members) it could be sued only in his name, and as trustee of it.

8 Cranch 30,  
Van Ness v.  
Forrest.

§ 57. A note given for the price of land conveyed is good, except the seller's title *totally* fail, and the promiser was ignorant of the defect ; is held, if he knows of the incumbrance, or the title fails but in part. See *Little v. Roberts*, Ch. 1, a. 42, s. 7. See cases 2 Phil. Evid. 11 ; 11 Johns. R. 51.

2 Wheaton's  
R. 13, Greenleaf v. Cook.

§ 58. A gave his note to a minor for his labour, he endorsed it to B for a valuable consideration ; B knowing the endor-

15 Mass. R.  
272, Nightingale v. Withington, 331.  
2 Phil. Ev. 14.

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ser was a minor ; his father received the contents of A ; he and the father both knowing of the endorsement Held, B could recover it of A, for a minor may endorse a negotiable note or bill, so as to pass the property ; and his acts are voidable only.

Where partners in trade are liable to the endorsee of a negotiable note, made by one of them to C, in the name of their firm, though he endorse C's name, without his knowledge ; 2 Phil. Evid. 14.

15 Mass. R.  
634, Bow-  
man v. Wood.

§ 59. An officer may take and sue a negotiable note as collateral security on an execution ; as where the deft. Wood had made such a note to Hodge, against whom the plt., a deputy sheriff, had an execution ; H endorsed it blank as a pledge to the plt. ; he sold it at auction to himself, as the highest bidder, and returned the sale on the execution, then recovered the note of the deft.

5 Taun. R.  
30, Bowes v.  
Howe in  
error.

§ 60. A plt. must declare, and state a presentment of a note, *at a particular place*, and a demand there, whenever it is so payable, unless the makers discharge the holder from such presentment and demand. Nor is this discharge shewn by an allegation they are insolvent, and have wholly refused then and thenceforth to pay, at the place specified, any of their notes ; nor can it be intended from the allegation of refusal, there was a presentment. And if the drawee accept a bill to pay at a *particular place*, he is liable to pay there only ; and the holder may reject such qualified acceptance ; but if he accept it, he admits a condition *precedent*, that he must present it to the acceptor for payment at that place, and plead accordingly, and allege performance of this condition either in an action against the drawer or acceptor.

5 Taun. R.  
344, Gam-  
mon v.  
Schmoll.

§ 61. A promissory note without words of negotiability, may, if the payee sue the maker, be declared on as a note within the statute.

3 Caine's R.  
137, Down-  
ing v. Back-  
instoes.  
2 Johns. R.  
235, 242.

§ 62. A note to pay £40, in land at \$2 an acre, may be given in evidence on the money count. *Smith v. Smith*, and an insolvent discharged in Rhode-Island, is no bar in New-York, to a note made in Massachusetts.

3 Day's Ca.  
12, Codwise  
& al. v. Glea-  
son.

§ 63. Though a note be not negotiable, yet the contract made thereon by *endorsement* extends to all future endorsees ; and an endorsee may sue a remote endorser.

4 Day's Ca.  
468, Sheldon  
v. Ackley.

§ 64. The endorsee in his action against the maker of a note, is not obliged to order the attachment or execution to be levied on property, clearly insufficient to pay the debt, or lose his hold on the endorser to that amount.

9 Johns. R.  
131, Simpson  
v. Griffin.

§ 65. Endorsee sues the endorser for default of the maker ; he cannot compel the maker to pay the costs of that suit : he is liable only for the amount of the note.

§ 66. What payment of a due bill to the payee, bars the holders action. A gave one to B in N. York, thus: "due to B \$170, value received." On it B endorsed his name, and delivered it to C; C, at Albany, demanded payment of it of A; A said next week he would settle it in N. York; afterwards, A paid it to B in N. York, and took a receipt in full, the due bill being still in his hands, C sued A in B's name on it. Held, there was not due notice of an assignment of the note, to charge A, with a fraudulent payment to B; and that C, the holder of the note, when he demanded payment of it, ought to have shown it, with the endorsement, to A, or explicitly stated that it had been assigned by B to C. Judgment for A. This was not a negotiable note; had it been one, the endorsement of B's name had been sufficient to pass the property.

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9 Johns. R.  
64, 65, Mc-  
ghan v. Mills.

## CHAPTER XXI.

## ACTION OF ASSUMPSIT. BILLS OF LADING.

ART. 1. *General principles.*

§ 1. It is settled in this case, after much discussion, that a bill of lading is transferrable and negotiable by the custom of merchants, and in this case the jury specially found, and which seems to be the law of the land, "that by the custom of merchants bills of lading, expressing goods or merchandise to have been shipped by any person or persons, to be delivered to order or assigns, have been, and are, at any time after said goods have been shipped, and before the voyage is performed, for which they have been or are shipped, negotiable and transferrable by the shipper or shippers of such goods to any other person or persons, by such shipper or shippers, endorsing such bills of lading with his, her, or their name or names, and delivering or transmitting the same so endorsed, or causing the same to be so delivered or transmitted to such other person or persons; and that by such endorsement and delivery or transmission, the property in such goods hath been, and is transferred and passed to such other person or persons, and that by the custom of merchants, endorsements of bills of lading in blank, that is to say, by the shipper or shippers, with their names only, have been, and are and may be filled up by the person or persons to whom they are delivered, or transmitted

5 T. R. 683,  
Lickbarrow  
& al v. Ma-  
son & al. A.  
D. 1794. See  
2 Phil. Evid.  
46, Custom  
of Merchants.

**CH. 21.** as aforesaid, with words ordering the delivery of the goods or contents of such bills of lading, to be made to such person or persons, and according to the practice of merchants the same when filled up have the same operation and effect, as if the same had been made or done by such shipper or shippers, when he, she, or they endorsed the same bills of lading with their names as aforesaid."

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Two principles being thus established. 1. That a bill of lading is negotiable. 2. That the legal holder may fill up a blank endorsement, he may any time after the goods specified in it, and before the voyage is performed, transfer the property of them to himself by filling such blank, or to another by a further delivery or transmission of this bill of lading.

1 H. Bl. 357,  
368. A. D.  
1790, Mason  
& al. v. Lick-  
barrow & al.  
in error.

§ 2. In this case in the Exchequer, in error, it was held, that "where the consignee of goods becomes insolvent, the consignor may stop them *in transitu*, before the consignee gains possession. In such case also the consignor may stop the goods *in transitu*, though the consignee assign the bills of lading to a third person for a valuable consideration. The right of the consignor not being divested by the assignment."

2 T. R. 63,  
Lickbarrow  
& al. v. Ma-  
son & al., A.  
D. 1787.—  
5 D. & E. 683.  
—6 D. & E.  
20.

§ 3. In this great contested case in the Court of Kings Bench there had been a judgment as to the first branch above, as in the Exchequer. But otherwise, as to the second branch, that is, as to this the court of King's Bench decided, "if the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor, as against such consignee, is divested." And further, that "there is no distinction between a bill of lading, endorsed in blank, and an endorsement to a particular person," and afterward the judgment of this court of King's Bench was confirmed in the House of Lords.

A. D. 1794.

1 W. Bl. 628.  
A. D. 1767,  
Wright, as-  
signee of  
Scott v.  
Campbell.  
Same case.—  
4 Burr. 2046.  
—Lex. M.  
Am. 164.—  
7 D. & E. 745.  
—6 East 20.  
—1 H. Bl.  
364.—Abbot  
314.—Cowp.  
296.

§ 4. In this case Fontaine, June 1766, shipped goods, value £400, from London to Liverpool, to be delivered to order or assigns and took bills of lading, and endorsed one to Swanwicke at Liverpool or order, this he endorsed to Scott, (pretending the goods were his own) as security for a debt of £800 he owed Scott &c. The goods had been consigned to Swanwicke as a factor only. The other bill of lading, a duplicate, had been endorsed to the deft, who on the arrival of the ship got possession, having given the master security. Scott became a bankrupt. Verdict for the plt. New trial was granted. Lord Mansfield held, first, it is clear, "that if there is an authority ever so general by endorsement upon a bill of lading, without declaring that the endorsee is factor, the owner (as between him and the factor) retains a *lien* till delivery of the goods, and before they are actually sold and turned into money."

Second, that "if the factor pays over with notice to a third person, then it may be followed in the hands of such third person." CH. 21.  
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But third, "if the goods be *bond fide* sold by the factor at sea, as they may be where no other delivery can be given, it would be good," and the vendee will hold them, though no actual possession is delivered, and the owner can never dispute with the vendee; "because the goods were sold *bond fide*, and by the owner's own authority." But the court thought this was not a fair transaction between Swanwicke & Scott, so a new trial was granted on this ground.

§ 5. A bill of lading is an acknowledgment under the hand of the captain of the vessel, that he has received such goods, which he promises to deliver to the person named in the bill. It is assignable in its nature, and by endorsement the property is vested in the assignee, and goods at sea may be so assigned. A bill to deliver to the agent of the shippers is to the shipper himself, and goods are subject to his order, but the agent must be known to be such. 2 Mor. Ess.  
176,—4 Burr.  
2046.—1 T.  
R. 216, per  
Buller J.—  
1 H. Bl. 369.  
—1 D. & E.  
745.—1 Bos.  
& P. 664.

ART. 2. *English cases.* See above. And also in this case A at a foreign port, shipped goods to B, by the order, and on account of B, to be paid for at a future day, and the master of the ship signed bills of lading accordingly. One of the bills was immediately sent to B, who, before the arrival of the ship, sold the goods to C, and endorsed the bill of lading to him. After the arrival of the ship, and a delivery was made of a part of the goods to C's agent; B became a bankrupt, not having paid to A the price of the goods. The court held, that by this delivery of a part of the goods, the *transitu* was at an end in respect to all the goods. Here then was an actual delivery of a part, art. 4, s. 4. 2 H. Bl. 604,  
Sleubey v.  
Heyward.—  
Lex. M. Am.  
166. See  
Consign-  
ments, Ch.  
26.

§ 2. June 1801, Brown, the bankrupt in London, gave an order on Fritzing of Hamburgh to ship him a quantity of beeswax. This he procured and shipped in a general ship on the account and risk of Brown, addressed to him; and the bill of lading was filled up to his order. He was a stranger to the persons who sold the beeswax. Invoice £750; for this Fritzing drew three bills on Brown, dated August 4, 1801, one £210, one £260, and one £280 payable to F's order at two usances, and informed Brown the same were drawn for the price of the wax, to be credited to him when the bills should be negotiated. Brown accepted them, and they were proved under his commission. August 10, 1801, he received the invoice and bills of lading, and September 2 committed an act of bankruptcy. September 3, Fritzing by his agent called at Brown's counting-house for security, and his brother delivered up to the debt., as such agent of Fritzing, the invoice and 3 East 92,  
Fiese & al. as-  
signees of  
Brown, v.  
Wray.

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bill of lading, Sept. 11, said ship arrived at London, said agent caused the wax to be entered at the customhouse, paid charges thereon, and ordered it sold on his account. This was accordingly done. Said bills negotiated by Fritzing became due Oct. 7, 1801, and not paid by Brown or Fritzing, he being insolvent, but they were taken up under protest by Feise for the honour of Kantens, to whom Fretzing sold and endorsed them, and Kantens sold and endorsed them &c. Feise so proved the bills under Brown's commission; and held Fritzing and his estate also responsible for the said bills. Judgment for the debt., Fritzing's agent; for he was in fact a vendor of the wax, and Brown the vendee. And this was but "the common case of the consignor of goods, who has not received payment of them, stopping them *in transitu* before they get to the hands of the consignee," though Brown accepted the bills. "Such acceptances proveable under his commission amounting at most to part payment for the goods, which does not take away the vendor's right to stop *in transitu*." "There was no privity between Brown and the owner of the wax." Fritzing bought it and sold it to Brown, and charged the first cost and his commission, a common case among English merchants, and he honestly got the bill of lading and stopped the wax *in transitu*, said the court.

7 T. R. 440,  
Hodgson v.  
Loy.

§ 3. In this case it was decided, that part payment for the goods does not destroy the vendor's right to stop them *in transitu* it can only reduce his *equitable lien*, *pro tanto* when he gets the goods into his possession.

3 East 381,  
Bohtlingk &  
al. v. Inglis &  
al. assignees  
of Crane, a  
bankrupt.  
A. D. 1803 —  
1 Esp. R. 240.  
—2 Esp. R.  
613.

§ 4. In this case Crane in England, Sept. 1798, chartered a ship on certain conditions, for a voyage to Russia to bring goods from his correspondents there to England; the plt. shipped 100 casks of tallow on Crane's account and risk, and sent to him the invoice and bill of lading. Held, the delivery of the goods on board of such a chartered ship did not preclude the consignor's right to stop the goods *in transitu* on board the same to the vendee, in case of his insolvency in the mean time, before actual delivery; any more than if they had been delivered on board of a general ship for the same purpose. And as the consignor's agent demanded the tallow of the master before unloaded, and he afterwards delivered it to Crane the vendee's assignees, they were liable in trover to the consignor. And the court held, as to that, the delivery to the master of this chartered ship was no more than a delivery to a carrier, which was clearly no actual delivery to the consignee. But otherwise, if he have the entire controul of the ship, as where he absolutely chartered the ship for three years, in a certain case cited. See 6 East 17, and post art.

Fowler v.  
Kymer,  
1 East 522.



4, s. 4. See Consignment Ch. 25, *Ellis v. Hunt*, and several other cases. CH. 21.  
Art. 2.

§ 5. In this action it was adjudged, that where several bills of lading have been signed of different imports, no reference is to be had to the time when signed by the master. But the person who first gets one of them by legal title from the owner or shipper has a right to the consignment; also when such bill of lading are constructively the same, though different on the face of them, and the master acts *bonâ fide*, a delivery according to such legal title will discharge him from all of them. And where one ships goods and the bills of lading are to his own order, he has the absolute controul over them, and may unship them &c. until he endorses the bill of lading.

1 T. R. 205,  
Caldwell &  
al. v. Ball.  
Same case in  
2 Mor. Ess.  
159, 179, 271.  
—Lex. Am.  
Mer. 163.—  
2 Cain. 38.—  
3 Cain. 182.

§ 6. If a bill of lading be not endorsed, the master can only deliver the goods to the consignee as factor, not as owner; for till endorsed the consignor has full power over this bill, and nothing but his endorsement can vest the property of the goods specified in it in any other person. The transfer of the bill is solely by endorsement. The endorsement of a bill of lading *primâ facie*, transfers the whole property, but this endorsement may be controlled by the evident intent of the parties.

In error,  
1 Johns. R.  
1, 19.

§ 7. In *Mills v. Ball* it was held, the vendor might stop the goods even after they were delivered to a wharfinger, who received them and paid the freight, and charged on account of the vendee, for as Lord Mansfield said in another case, the vendor or consignor may do this till the goods actually come into the hands of the vendee or consignee, to his corporal touch. Consignee or vendee becoming a bankrupt declined the goods.

2 Bos. & Pul.  
457, *Mills v.*  
*Ball.*—3 East  
389.—3 T. R.  
466.—7 T. R.  
444.

§ 8. Where the master is supercargo, bills of lading are unnecessary, for then he is not so accountable to others as to make such instrument necessary, and it is required that this bill should declare on whose account and risk the shipment is made. See *Insolvency*, Ch. 39, a. 1, *Reader v. Knatchbrill*, and other cases.

Am. Lex.  
Mer. 119.—  
1 Rol. Ad. R.  
27.

§ 9. Cloth was purchased by the vendee, but not paid for. It was sent to an innkeeper on account of a trader with a bill of parcels, the receipt of which he acknowledged and credited in his books the amount to the vendor. The vendee ordered it to a wharf to be shipped where it arrived too late, and was taken back to the inn with directions to the innkeeper from the vendee to take care of it till another opportunity offered. The court held, this cloth still remained *in transitu*, and there was no actual delivery to the vendee.

3 T. R. 466,  
*Hunter v.*  
*Beal.*—Lex.  
Am. Mer. 165.

§ 10. If the assignee of a bill of lading take it, knowing another has an equitable lien on the goods, he takes it subject to

*Dick v. Lams-*  
*den.*—Lex.  
Am. Mer.  
166.

CH. 21. this lien, though this be not expressed in the endorsement, but in a letter &c.

Art. 3.

Lex. Am.  
Mer. 167.

§ 11. The goods of one belligerent cannot be altered *in transitu*, as it respects another belligerent. For in a state of war existing or imminent, it is held, the property shall be deemed to continue as it was at the time of shipment, till the actual delivery. But this rule is only between belligerents.

2 Dall. 181.—  
1 Dall 3, Ste-  
venson v.  
Pemberton.

ART. 3. *American cases.* A being indebted to B, shipped goods to pay him, and the master of the ship gave a bill of lading, and it was held, that goods immediately on being shipped, and bill of lading signed, become the property of the consignee, as these goods were shipped to pay a debt.

2 Dall. 180,  
Wood v.  
Boach.—Lex.  
Am. Mer.  
164.

§ 2. But in the same court it was determined, that where the evidence of the consignments, being for a *bonâ fide* creditor, was doubtful, and a part of the property was not shipped, they had not passed by the mere shipment of a part and signing the bills of lading; the original owner of the goods he finds is deemed to have a *lien* on them to the amount of his rights, hence has arisen the right of stopping *in transitu*, the goods transmitted, if not paid for, or if reasons exist to suppose the consignee is insolvent.

4 Mass. R.  
115, Bridge v.  
Austin.

§ 3. *Assumpsit* against Austin in consideration the plaintiff made him his bailiff of one case of linens of the value of \$500, and had agreed to allow him a commission of 5 per cent. on the sales, promised the plaintiff to transport it to Charleston, S. C. at the defendant's risk, against all danger but of the seas, and to dispose of the same to the plt's. best advantage, and to account &c. The goods arrived safe at Charleston, and were there deposited in a store, out of which they were stolen; the contract was expressed in a paper in the form of a bill of lading nearly. Held, the deft. was accountable to the plt. for the value at Boston, the place of shipment, deducting said commission on his contract, though not in fault, and five per cent. was the usual commission for selling only, and making returns. Leave to amend the declaration &c. The property passes by assigning a bill of lading *bonâ fide*, though made after the arrival of the goods in port, Chandler & al. v. Belden.

18 Johns. R.  
157.—7 Mass.  
R. 297, Bar-  
rett v. Ro-  
gers. See s.  
12.

§ 4. The deft. received at Liverpool, to transport to Boston, a quantity of *velvets in cases*, and gave a bill of lading in common form, expressing they were in good order, and to deliver them in like good order &c., the dangers of the seas excepted. Held, this bill signed at Liverpool was not conclusive evidence the goods were in good order when there shipped, though *primâ facie* strong evidence of the fact. The goods were done up in cases, and the master never saw them except the outside of them. Nor is it usual for a master of a

vessel to examine the goods when he gives such a bill, and often he is not skilled in goods he receipts for.

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§ 5. A usage for carriers to retain goods as a *lien* for a general balance of account between them and the consignees, cannot affect the right of the consignor to stop the goods *in transitu*.

Oppenheim v.  
Russell.—  
3 Bos. & Pul.  
42.

§ 6. Under some circumstances the mere affirmation of the master to a bill of lading, works a transfer of the property ; but this is only where the purposes of justice demand such a construction. For this reason, shipments fairly made to pay *bonâ fide* debts, passes the goods on signing the bill of lading ; for in this the lader's intention is clearly expressed, and the law implies, the creditor accepts the consignment, as every one is supposed readily to accept the payment of his honest debt. Also the goods shipped in such cases are to be viewed as paid for, and the delivery of the goods to the master to be carried to the creditor to pay his just demand, is to be viewed as a delivery to the creditor himself. On these grounds it was decided in America, before the American revolution, that goods thus shipped to pay a debt, could be attached for the consignee or creditor's debt, on the principle the property of them was vested in him by the delivery to the master. The payment of such debt being a consideration equal to actual payment for the goods.

Lex. Mer.  
Am. 163.

§ 7. In this case the plt. chartered and loaded a vessel at the request, and on the account of certain merchants, declared bankrupts. She arrived and their assignees went on board her, and claimed the cargo as the bankrupt's, and opened some of the bales &c. The ship was then ordered into quarantine ; while performing, a person for the plt., Holt, to whom he had endorsed one of the bills of lading, applied to the master for delivery of the cargo. He refused, being indemnified by the assignees, one of whom continued on board during the quarantine ; at the expiration of it the cargo was landed and delivered to the assignees. The plt. brought trover against the master, and the court decided that the property was *in transitu*, and might be stopped during the quarantine. But it appears if the vessel be chartered or owned by the vendee or consignee, and entirely under his controul, then a delivery on board her is a delivery to him, and of course defeats the right to stop *in transitu*. For as the carriage is solely by him, and in no sense in the controul or possession of the seller or consignor, or of his master or servants, the vendee or consignee has the sole possession, and therefore the *transitu* is at an end.

Lex. Mer.  
Am. 166, 166,  
Holt v. Pow-  
nall.

It is further true, that to put an end to the *transitu* and to the consignor's right to retain the goods in the bill of lading

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Art. 3.



&c. they must not only have come into the hands of the consignee or vendee in fact, or of his special agent, but his possession must be acquired with the consent of the original owner. Hence, if the vendee meet the goods on their way and take possession of them, they are still in *transitu* till they arrive at the place of their destination. So a bill of lading may like a bill of exchange, or other negotiable contract, be assigned over specially, and so as not to convey any interest from the original possessor beyond the letter and terms of the endorsement. As where the endorsement is to "deliver the contents to A. B. on my account," A. B. receives on his account, and is not enabled to put the property in circulation, however absolute the property of the *bona fide* assignee for a valuable consideration may be against all the world, even the assignor who has not been paid for his goods, yet if the assignee take it knowing the goods are not paid for, he takes the property subject to the same equities as it was when in the assignor's hands, and it is enough the fact appears in the endorsement in bills of parcels or in letters, or in any other way which conveys to the assignee a knowledge of the fact.

10 Mass. R.  
510, Wallis &  
al. v. Cook.

§ 8. This was *assumpsit*—the plts. shipped in the ship *Osprey* on a voyage from Salem to South America, the goods described in the bill of lading signed by the deft., in which it was agreed the net proceeds of the goods, after deducting five per cent. commissions and \$14 for freight, should be paid to the shippers in nine days after the ship's arrival at her port of discharge in the United States. She safely arrived in South America, and the goods sold, and the net proceeds amounted, after deducting duties, charges, and freight out, to \$900 41. On her return for New York she stranded near New London lighthouse, and cargo was damaged fifty per cent. She was got into port and repaired, so that she might have gone to her intended port of discharge, but did not. Held, the shippers were entitled to the net proceeds of the goods, without any deduction for the loss by stranding, though they had caused their interest to be insured the voyage round, for they had no risk in the goods homeward by their contract. They were to be repaid in full if the ship arrived here in the United States, without out limitation of time, or as to the port, and she did so arrive, and it was no condition she should arrive without damage.

12 Mass. R.  
566, Forrester  
v. Dodge.

§ 9. *Assumpsit* for the value of certain goods, plt's. property, shipped at Calcutta in the Caravan owned by the deft., bill of lading signed by Augustine Heard, the master, for ninety-two bales of piece goods; plt. had received fifty-five of them only. Action was for the other thirty-seven. The bill of lading was in common form, excepting "the danger of the seas, the laws

of the country, and other unavoidable accidents." The master received orders from the plt. to manage, as A and B had directed as to their goods in the same vessel. Held, the master's conformity to the directions of either A or B was sufficient to justify him. (Jan. 1813, the master went into Pernambuco, and there hearing of the war left about one third of his cargo to lighten his vessel and cause her to sail faster.)

CH. 21:  
Art. 3.

§ 10. Goods were shipped for the account and risk of the consignee, he paying the freight, and so expressed in the bill of lading and invoice. A delivery of the goods to the carrier is a delivery to the consignee, and he alone can sue the carrier if not delivered. The bill of lading in such case vests the property in the consignee. See next article, also 1 Johns. R. 1 to 19, *Ludlow v. Bowrie & al.*

1 Johns. R.  
215, 228,  
Potter v. Lan-  
sing.—2 Phil.  
Evid. 46.

§ 11. *When a master may leave goods and not be liable on his bill of lading.* As where he signed such bill to deliver goods to A. B. at Norfolk from New York. A. B. was a transient person, and not resident at Norfolk, and when the master arrived there he inquired for A. B., and not finding him, delivered the goods to a merchant there for A. B. The master acted *bonâ fide*, and according to the usage. Held, he was not liable on the bill of lading to the consignor.

2 Johns. Ca.  
371, Mayell  
v. Potter.

So where goods were shipped at N. York, and consigned to the master to be sold at Bourdeaux, the master could not find a purchaser, and left the goods there and returned to N. York; he acted *bonâ fide*. Held, he was not liable to the owners.

1 Johns. Ca.  
174, Lawler  
v. Keaquick.

§ 12. A bill of lading is not conclusive evidence of property; and though it express the property to be A's, it may be proved to be the property of another.

6 Cranch,  
338, Mary-  
land Ins. Co  
v. Ruden.

§ 13. *Of stopping in transitu.* Replevin for 2 hhds. of hard ware; plea, property in Wm. Hill, and denied it was in the plt. and issue. Scholfield & Co. in England, shipped these goods to Hill, in Portsmouth, in N. H. contrary to his orders to them, and sent him a bill of lading; he refused to receive them; were attached by the deft. a deputy sheriff, for Wilby, as for Hill's debt; the agent of Scholfield & Co. caused them to be replevied. Judgment for the plt. Attached on the ground the property vested in Hill, when he received the bill of lading; and then it was too late, as said, for the consignor to stop them in transitu: held otherwise, for here no delivery ever took place, which could create a change of property.

14 Mass. R.  
40, 43, Schol-  
field v. Bell.  
—2 Phil. Ev.  
46.

§ 14. The mere endorsement of a bill of lading, without a delivery of it, does not transfer the property it contains; what a sale of a vessel. This was replevin of the brig *Sophonina*, and her cargo, claimed by the plts. as being purchased by

15 Mass. R.  
528, Buffing-  
ton & al. v.  
Curtis. Cited  
2 Phil. Evid.  
46.

CH. 21. them of Jos. T. Wood, against the defts., deputy sheriffs, who  
 Art. 4. attached them as his property. Judgment for the plts. for the  
 brig, and costs for the defendants for the cargo and return  
 &c., with damages 6 per cent. on double the value of it, as  
 valued in the replevin bond. 1st. as to the vessel, because  
 the bill of sale was made and delivered by Wood, to the col-  
 lector, a third person, to the plts' use, and by their previous  
 assent, July 16, 1816; and the defts. attached 18th, though  
 the plts. took possession the 19th: but this possession was in  
 reasonable time. 2d. The endorsement of the bill of lading  
 conveyed no property to the plts in the cargo, though en-  
 dorsed by Wood before the attachment, because he made no  
 delivery of it to any body till after it. *Secus* it seems, had it  
 been left with the collector to the plts' use, as the bill of sale of  
 the vessel was; or had it been enclosed in a letter to the plts.  
 and put into the post-office before the attachment. If a bill  
 of lading consign goods to a neutral, not accompanied by an  
 invoice or letter of advice, the bill is sufficient evidence for  
 the admission of farther proof.

3 Wheat. R.  
48.

ART. 4. *Further English cases.*

3 East 585,  
Walley v.  
Montgomery.


§ 1. *Consignor chartered a ship for the consignee, and ships goods on his risk, &c.; property is immediately his, &c.* Trover for a cargo of timber; and it appeared the consignor chartered the ship on account of the consignee, enclosed an invoice expressing the timber was on *his account and risk*; also a bill of lading in common for it expressing the delivery to be made to order, &c. *he paying freight according to charter-party.* Consignor, also, drew bills on the consignee, at 3 months, for the value of the cargo. Held, the invoice and bill of lading sent to the consignee, and the delivery of the timber to the captain, vested the property in the consignee, subject only to be divested by the consignor's right to stop the goods in *transitu*, in case of the *insolvency* of the consignee. The bill of lading sent, was endorsed in blank, and was sent by the master; and as the timber in the voyage was at the *risk of the consignee, his accepting the bills and paying freights at the end of it*, could not be a *condition precedent* to the property's vesting in him, but otherwise, if not so *at his risk*.

4 East 211,  
Coxe & al. v.  
Harden & al.  
—See 6 East  
371.—3 Bos.  
& P. 149.

§ 2. Trover for eighteen mats of flax, shipped in a general ship, from Rotterdam to London. The consignors, Brown & Co. at Rotterdam, shipped the goods *on account and at the risk of the consignees*, Oddy & Co. in England, in pursuance of orders, and took bills of lading from the captain to deliver to the *consignor's own order*; and sent one of such bills, *not endorsed*, with the invoice to the consignees, enclosed in a letter informing them they had drawn on them for the amount. The consignors also sent, by way of precaution, another bill

of lading *endorsed to their own agent*, the plt. Held, that on the shipment on the *account and risk* of the consignees, the property vested in them; subject only to be divested by the consignor's stopping the goods, while *in transitu*. Consignees did not accept the bills, having become bankrupts a few days before the ship arrived; the flax was received by the defts. on an *unendorsed* bill of lading, paying the freight and duties, and sold it, and credited Oddy & Co., the consignees, on account of a debt they owed the defts. who were their assigns. If the consignors had a right to stop *in transitu*, they did not exercise that right; but the captain actually delivered the flax to the consignees order. And at any rate the plt. had no right to recover in *trover* on the *endorsed* bill of lading, because he paid *no valuable consideration*; and Lord Ellenborough said, "no decision of a court of law upon the subject of bills of lading, has gone further than to say, that the assignment of a bill of lading by the consignees, for a valuable consideration, and without notice by the party taking it, of a better title, passes the property in the goods thereby assigned." As the consignees became insolvent and had not paid for the flax, the consignors might have stopped it *in transitu*, if they had, by themselves or agent, exercised that right in season, and before the flax came into the possession of the assignees of the consignees.

CH. 21.  
Art. 4.



§ 3. *Where the consignee's assignee becomes his partner, &c.* Trover for 705 pigs of lead, value £1000. Ed. Hague bought the lead of the defts. in Liverpool, March 1, 1787, and ordered them to ship it to Rouen in France. It was so shipped, March 10, 1787, by the defts. at Chester. The bill of lading was endorsed in blank by the defts. and sent to Hague. The plt. March 16, 1787, gave Hague his acceptances for £700, and he delivered the bill of lading to the plt. as security. Afterwards, Hague, the consignee and the plt. by agreement, became partners in the lead, and *by their agreement it appeared the consignors, the defts. had not been paid for it*. Held, they had a right to stop it *in transitu*, and hence the plaintiff could not recover, &c. Hague became *insolvent*. In this case the plt., assignee of the consignee, of a bill of lading endorsed blank, seems to have failed, because he, by his agreement, became a partner in the goods, with the consignee, and made himself paymaster; hence, put himself in the consignee's place, and became bound to take the bill of lading subject to the same rights. See *Richardson v. Goss*.

2 D. & E. 674.  
Salomons v.  
Nissen & al.

§ 4. *When transitus ends.* Trover for files by plts. Moore ordered the goods from the plts., manufacturers at Sheffield, Nov. 14, 1788; they sent them by Royle's wagon, directed to Moore, in England. The files were left in a cask at Stam-

3 D. & E. 464.  
Ellis & al. v.  
Hunt & al.  
assignees of  
Moore, a  
bankrupt.

CH. 21.  
Art. 4.

ford in the way to town; and put into Hunt's wagon, which brought the cask to the Castle and Falcon inn, in London, Nov. 22, 1788; the plts. drew a bill on Moore for part of the value of the files; this bill was never paid. At said inn the files were attached by a creditor of Moore. Moore's assignees, the defts., went to the inn and put their mark on the files, but did not remove them, being so attached there. Held, the consignors could not afterwards stop them *in transitu*; because not then *in transitu*. Also held, in this case, that it is not necessary in order to divest the right of the consignor to stop *in transitu*, that the goods should have been taken by the very hands of the consignee himself. The files were viewed as having arrived at the end of their destined journey, when at the inn, and the consignees' assignees set a mark on them 4 days before the consignors, the plts., wrote a countermand of the delivery of them. So where goods came to a wharfinger's hands sold for an entire sum, to be paid for in a bill at 2 months; and orders to him to deliver to the vendee, who went to the wharf, weighed the whole, and took away part, and then became a bankrupt: held, this was possession of all, and the *transitu* at an end. See *Slubey v. Heyward*, art. 2; 6 East 614; 2 Esp. R. 613; 4 do. 85; 1 Camp. R. 109, 282, 482.

New. R. 69.  
*Hammond & al. assignees v. Anderson.*

1 East 516,  
*Inglis & al. assignees v. Usherwood.*

See *Richardson v. Goss*;  
also  
5 East 175—  
2 H. Bl. 504.

*Leeds v. Wright, Scott v. Pettitt.*

9 East 606,  
*Cuming v. Brown.*—1  
Johns. R. 18.

The consignor in Russia delivered goods on board a ship chartered by the consignee. Held, this is a delivery to him, and the *transitus is at an end*. But if the laws of the country or those of Russia, on the consignees' becoming insolvent, authorize the consignor to reclaim and retake the goods so shipped, by process, he may do it without process, by the master's consent. So the *transitus is at an end*, when the consignors send goods to the known agents of the consignees, and by their orders to be shipped abroad. According to a usual course of business, among the parties; as vendees in London sending orders to vendors in Manchester to send goods to vendees' correspondents at Hull, to be shipped to Hamburgh, as they had practised. Held, delivery to the correspondents was a delivery to the vendees; and put an end to the *transitus*. The correspondents were the *general agents* of the vendees in this business. Case decided on a similar principle, 3 Bos. & P. 320, &c. and 469. So if a vendee commonly uses A's store for his goods, delivery there is delivery to the vendee, and the *transitus is at an end*.

§ 5. One is a fair assignee of a bill of lading, though he knows the consignor of the goods has only taken security for payment for them—as where the endorsee of such bill for valuable consideration *bonâ fide*, knew at the time, the consignor had not received money for the goods sold, but had only taken



the acceptances of the consignee, payable at a future day, not arrived. And 2d., after such assignment of the bill of lading, the consignor cannot stop *in transitu*, though the consignee become insolvent. CH. 22.  
Art. 1.

§ 6. Held that a bill of lading is not a necessary instrument of the transfer of property, in goods consigned to the owner; nor is one partner in the goods, who as an agent, is paid a proportion of the profits of the adventure. Also, the property in a cargo for which the master has signed bills of lading, may be transferred by delivery without endorsing the bills. The transfer is good against all but after endorsees of the bills of lading for a valuable consideration.

5 Taun. R. 74.

5 Taun. R. 558, Nathans v. Giles.

§ 7. If the master be dead at the time of the trial, proof of his death, and of his signature, has been deemed sufficient evidence of the interests of the consignee. If living, proof of his signature will be sufficient evidence of that interest, except as to shipping the goods.

Haddon v. Parry.  
3 Taun. 302.  
—2 Phil. Ev. 47, 48.

§ 8. If the bill of lading be made for delivery of the goods to the consignor or assigns, or to order or assigns, and be endorsed generally, not designating any person, the holder of it has authority to dispose of the goods, and a bill so made, endorsed by the consignor to a third person by name, gives him the same authority. In the first case the blank endorsement is an authority to the *holder* or *bearer*; in the second, to a particular person as to transferring property by bills of lading, &c. See Factor, Ch. 30, and Consignments, Ch. 25, and the case of the *Venus*, see Ch. 224, a. 9, s. 5; *Ludlow v. Bowne & al.* Ch. 40, a. 17, s. 22.

2 Phil. Evid. 46, 47.—Abbot on Shipping 392.—  
6 East 41.  
See Ch. 30, a. 7.

## CHAPTER XXII.

### ACTION OF ASSUMPSIT. BY-LAWS AND CORPORATIONS.

ART. 1. A bye-law, or by-law, is a private law made by a corporation constituted by a statute or charter, custom or prescription, for the orderly government of their members and affairs, within some particular place, as a township, bounded parish, &c. or not confined to such place, as a poll-parish, or of tenants in common, or of a bank, &c. the proprietors in which are limited to no place. The word by-law is of uncertain derivation. Every by-law must be consistent with the

See Debt on By-laws &c., Ch. 143.

3 Burr. 1837.  
—1 Burr. 130.

## CH. 22.

## Art. 1.

3 Burr. 1827,  
Rex v. Spenser.—3 D. &  
F. 189, New-  
ling v. Francis.

public law of the land. Where the power to make by-laws is vested in the body at large, they may delegate it to a select body—per Lord Mansfield. This position certainly has many exceptions. No by-law can exclude an integral part of the electors, or narrow the description of the eligible persons, or add a qualification not required by the charter or statute. 4 Burr. 2204; 4 Inst. 48, 49. Where the manner of electing officers is not pointed out in the charter &c., the corporation may from time to time make by-laws to regulate their elections. By-laws are usually enforced by actions of debt and assumpsit. Hence, the numerous questions respecting them mostly arise in these actions. See more of by-laws, Debt, Ch. 143.


1 Esp. 7, cites  
2 Lev. 262,  
Surgeons'  
Company of  
London v.  
Pelson.—  
Clift. 901,  
902.—  
12 Mod. 269,  
686, Latham  
v. Barber.—

§ 2. If “a person becomes a member of any society or company &c., he thereby agrees to abide by all legal claims arising against him from the *by-laws*, or local regulations of that society to which he belongs. Therefore, *indebitatus assumpsit* was held to lie against the deft. for £20, being a penalty forfeited by the *by-law* of the company, for not serving the office of steward in pursuance of such *by-law*.” This action was upon the principle, that when the deft. became a member of this company, he impliedly engaged to obey its by-laws, and promised tacitly to pay such sums as he thereby should forfeit. Where a member must aver his title to his shares, 6 D. & E. 67.

Latch. 402.

§ 3. As every town and corporation in the United States must necessarily have its rules and regulations, or in other words, its by-laws for governing its affairs, and its members, in all those minor special concerns to which the statutes and general laws of the land cannot well extend; these by-laws must be very numerous, and at first view it may naturally appear that the actions grounded on them must be very numerous, but experience is otherwise. It is but seldom in practice we find an action necessary to enforce a by-law. They commonly concern small matters, are simple and plain, and generally understood by all.

§ 4. But questions whether this or that corporation has power to make this or that by-law, or whether, when made it is good or not, often arise in some shape or form; the discussion of which in detail I shall not enter into in this place. I shall here only state the grounds on which corporations have this power, and a few principles on which by-laws are generally allowed. A true principle is laid down by the Supreme Court of the United States, to wit: a corporation which has only a legal existence can act only in the manner prescribed by its act of incorporation, from which it derives all its power. This is to them an enabling act. It alone enables the body politic to act and contract, and it must observe the mode of

contracting named in the statute. 2 Cranch 127 to 170, Head CH. 21.  
 & al. v. Providence Insurance Company; 2 Johns. R. 109, Art. 1.  
 115, Beatty v. Marine Insurance Company. 

§ 5. How far Congress has power to create a corporation or body politic, is a question that was much discussed in the case of the Bank of the United States, incorporated in 1791. The better opinion certainly was, that the Federal legislature had this power.

§ 6. There never has been a doubt, but that each state legislature in the Union has power to make corporations of almost any description, civil or religious. And so it is universally admitted the Federal legislature may, in places in which it has exclusive legislation, as in the District of Columbia and other places.

§ 7. By this act towns in Massachusetts are empowered to make "by-laws for directing, managing, and ordering their prudential affairs as they shall judge most conducive to the peace, welfare, and good order thereof; and to annex penalties for the observance of the same not exceeding \$5 for each offence, to enure to such uses as they shall therein direct, provided they be not repugnant to the general laws of the government; provided also, that such orders and by-laws shall have the approbation of the court of General Sessions of the peace of the same county." Other corporations very numerous, and of different kinds, have powers by statute law, usually in their respective acts of corporation, to make by-laws under restrictions similar in principle to those above expressed. This power to make by-laws in towns cannot be delegated.

Mass. Act,  
March 23,  
1786, sect. 7,  
the Colony  
and Province  
Laws Revis-  
ed

§ 8 We have not in the United States, strictly speaking, corporations by *prescription*. Almost universally the original of each corporation is a matter of record; however, though the country is young, yet it is old enough for prescription. Rights and corporations may have existed beyond the memories of the oldest persons, or further back than any records on the subject are to be found.

§ 9. In this case it was decided, that after forty years a corporation may be proved without shewing an act of incorporation. In this case the Secretary of the Commonwealth certified, that no act of incorporation could be found of the North Parish in Harwich. The defts. were permitted to prove a parish by reputation, it having existed above forty years. 10 Johns. R. 389. Though a turnpike corporation pledge the income of a toll-gate, it retains the possession, and if cut down, has trespass, and though a penalty be given for the injury also.

5 Mass. R.  
547, 563, in  
Dillingham  
v. Snow & al.

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## Art. 1.

3 Salk. 76,  
77.—12 Mod.  
686, 687.—  
Litch. 564.—  
Carter 86.—  
Raym. 294.—  
1 Burr. R. 16.  
—3 East 185,  
—8 Co. 129.  
—Cro. El.  
803.—1 W.  
Bl. 372.—  
4 Burr. 1921.  
10 Co. 31.—  
Hob. 211.  
Salk. 142.—  
Carth. 482.—  
5 Mod. 439.—  
5 Co. 63.—  
Moor 579.—  
Hob. 212.—  
Brownel 288.

§ 10. It is laid down in *Salkeld &c.*, that in all charters of incorporation there is a special clause by which they have power to make by-laws; but that such enabling clauses are needless, "because they are included in the very act of incorporating," as a power to sue, to purchase, &c. "For as the natural body has reason to govern itself, so bodies corporate must have laws." But all by-laws must be subject or subordinate to the government, and are void when not so. And, therefore, under a general power to make by-laws it is clear, a law cannot be made to restrain trade, but may be to regulate it; as it is for the public good that trade be free and encouraged, it is against the public interest to restrain it; but otherwise merely to regulate. 1 Wils. 233; 1 *Ld. Raym.* 499; 7 *D. & E.* 543.

§ 11. A corporation may make by-laws without an express power given by its charter to make them; though created within memory, or for a particular purpose. It may be added it is of necessity and in the nature of the case, for without such a power it exists to little or no purpose. And whenever a number of persons are made a body politic to certain purposes, a power to make rules and regulations in subordination to the law of the land to effect those purposes when not expressed is necessarily implied, especially in regard to its own members, as to enact a penalty to compel a member to serve in an office of the corporation.

§ 12. It is usual, however, in the United States, by the charter or act of incorporation to enable this body politic to sue and be sued, and to establish such by-laws as they may find convenient for governing the corporation, and managing their affairs, not repugnant to the laws and constitution of the state. Where one makes his deed to a corporation by a certain name, he and those claiming under him admit that name.

§ 13. A by-law is not good or to be executed when against the public interest or public policy. When a by-law is so or not is a question often agitated, and will be pursued further in Ch. 143; at present only a case or two will be mentioned. (How a by-law must be founded on statute or custom, 2 *Maule & Sel.* 54.)

§ 14. In this case it was held, that a by-law made by a company of fishermen carrying on trade in partnership, to prevent any one of the members carrying on trade separately on his own account is a good by-law. This may be so by contract, and it seems it may be so by a by-law.

Lord Kenyon in this case said, "there is nothing illegal in partners agreeing to prevent any one partner carrying on a separate trade elsewhere on his own account, and if not, I do not see any reason why the same thing may not be prevented by

8 T. R. 352,  
Rex v. Steward & al.

7 East 487.

a by-law in the case of a company like the present." This was a company of freemen and partners by prescription. He added, a by-law can be good in part and bad in part, only when the two parts are entire and distinct from each other. "And when the power of removal is not given to any particular part of a body, it vests with the company at large."

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§ 15. A power to make by-laws vested in the body at large, may be delegated to a select body to be thereby executed. This is often practised, as where powers are given to bank corporations at large, these powers have been frequently delegated to their boards of directors.

1 Bl. Com.

122, Chris.

Notes.—

3 Burr. 1837.

§ 16. A corporation made for a particular purpose is dissolved whenever that purpose ceases.

12 Mod. 19.

§ 17. It has been held, that a parish may tax themselves to carry on a suit for the benefit of the parish; but in this case a majority will not bind the rest as in the case of other taxes. This was said in the case of an English parish, and the court seems to have gone on the ground of individual consent to the tax, not on the ground of a corporate vote. Hence, the question will still arise in each case, how for a parish or a corporation can, by vote, tax its members, and generally no further than power is given expressly or impliedly.

12 Mod. 448,

Rex v. Everard.

§ 18. A corporation aggregate of many persons cannot do homage or receive it, "for the fee vests not either jointly, or in common, in the persons whereof the society consists, but in the body politic formed by operation of law from the persons so united, which is invisible and exists only in supposition of law, and can do no act but by attorney," nor without writing. Hence, a corporation aggregate cannot without deed command their bailiff to enter upon their lessee for condition broken. This must be understood where a deed is by law required in an individual's case; for it is a very common case for a corporation aggregate to act and to empower an individual in its behalf by a written vote, attested by its clerk, secretary, cashier, or other proper office. And it has been decided by the Supreme Court of the United States, that a corporation can without deed authorize one to act in its behalf, this too must mean where the thing to be done does not require a deed; for a corporation cannot empower its agent without deed to convey lands in fee, as in such case the law requires the conveyance to be by deed. Hence, the power must be by deed, so in an individual's case to be recorded with the deed, however the practice has been very general to authorize by vote agents and committees to convey lands.

Co. L. 66, 67,

94.—6 Co.

38.—4 Com.

D. 247.—Cro.

Car. 170.—

1 Dyer 102 B.

—1 Rol. Abr.

614.—Cro.

El. 815.—

1 Bl. Com.

475.—1 Bac.

Abr. 507.—

1 Johns. Ca.

85.—1 Ventr.

47: See Ch.

143, a. 1, s. 9.

§ 19. In replevin, distress by the debt. for a forfeiture for the breach of a by-law of the plt's. cattle on a common &c., which the plt. replevied. Special pleas by the debt., in which

3 Wils. 155.

171, Gerrish

v. Rodman.

CH. 22. he claimed a right to distrain for a penalty for the breach of a  
 Art. 1. by-law, and all former by-laws on the subject, but these former by-laws were not set forth in his plea; and held bad, for a by-law must be set forth that the court may judge of it.

8 Mass. R.  
 326, Titcomb  
 v. Union M.  
 & F. I. Com-  
 pany.

§ 20. Case against the corporation for not transferring to the plt. fifteen shares, he took by execution from George A. Rogers, attached April 7, 1809, as his. July 21, 1809, they were levied on, and August 22, 1809, sold to the plt. at \$5 a share, being previously pledged to the company for Rogers' debt. Sept. 4, 1809, Bagley, the officer, left a copy of the execution and return at the office of the company, and the plt. tendered to the secretary his reasonable fees for recording and transferring the said shares to him &c. The act incorporating the company passed February 27, 1807, was read. This act prescribed a particular mode for attaching and selling a member's shares on execution. Held, this mode superceded that prescribed in the general law, passed March 8, 1805, on the same subject. The sale by Bagley was meant to be on this act, and was void. And Sewall J. doubted if the general statute which related to turnpikes, canals, and bridges, and other companies, extended to banks and insurance companies, so unlike in the condition and management of their property from turnpikes, canals, and bridges. And said, perhaps the other companies meant other like companies, and not monied institutions. The *special* manner must prevail. A new bank is not liable to pay the bills of a former bank, though of the same name, and has the same officers, though they often declare the bills of the old as good as the bills of the new bank. The corporations are distinct. 14 Mass. R. 58, 64, Wyman v. Hallowell & Augusta Bank, and 181, 184.

2 Mass. R. 37,  
 Union Turn-  
 pike Corpo-  
 ration v. N. E.  
 M. I. Compa-  
 ny & Trus-  
 tees of & al.

§ 21. *Cases in the United States.* In this case the New England Marine Insurance Company was sued as trustees to Jenkins, on Massachusetts trustee act of February 28, 1795, and it was decided, that a corporation aggregate cannot be sued as trustee. This was *assumpsit* by a turnpike corporation in New York, against one of its members on his promise to pay his assessments on his shares and neglecting to pay them.

2 Mass. R.  
 269, Ellis v.  
 Marshall.

§ 22. In this case it was held, that if the legislature by statute incorporate certain persons by name, to make a street and subject the individuals to assessments made by the corporation to meet its expenses, one named in the act is not bound, unless he assented to it. Without such consent he is not a member. "All incorporations to make turnpikes, canals, and bridges &c., must be considered as a grant or charter, obtained at the request of individuals for their benefit." One may refuse the grant whose name is inserted in it by mistake or

misrepresentation, and avoid the burden it imposes. The legislature has no "power over the person to make him a member of a corporation, and subject him to taxation *volens volens*, for the promotion of a private enterprise." Marshall did not sign the petition, nor was there any evidence he ever consented to be a member; and in the only act in which he noticed the corporation, he protested against its power over him. From the general course of the evidence the presumption arising from his name being in the act was much weakened if not destroyed. The acts as to fences, common fields, and as to commissioners of sewers, are (said the court) public acts promotive of general convenience. "This is a private act, obtained at the solicitation of individuals for their emolument and advantage."

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§ 23. In this action, grounded on the policy of insurance of the company, it was held, that a member of it may at his own discretion surrender his policy, after alienating the building insured; and at the time of the surrender may demand his proportion of the funds, until which time the policy does not expire. The plt. insured March 1, 1799, on his house in Boston \$6000, for seven years; paid \$24 premium and \$96 deposit money, and was liable to be assessed \$240, all according to the rules of the corporation. This made him a member. May 14, 1800, the plt. sold his house and took a mortgage, and January 1, 1802, it was discharged, but Oct. 29, 1800, the plt. had assigned it. April 25, 1802, the plt. applied to the company to surrender his policy, and demanded of them to pay him \$96, his deposit. They refused, saying, the policy expired above a year ago, and hence the \$96 was forfeited. But judgment for the plt.; for his not surrendering was sufficient to continue his policy and membership. He not having surrendered his policy, he remained a member, though he sold his house, and his policy did not expire till he elected to surrender, April 2, 1802. The effect of the mortgage was not decided.

2 Mass. R.  
316, Sullivan  
v. Mass. M.  
& F. I. Com-  
pany.

§ 24. In this case an execution issued against an aggregate corporation, by the name of the president, directors, and company &c., directing the officer for want of estate to take their bodies. And the court decided, that a member could not be taken or arrested, and if arrested and he pay the execution, he may have trespass against the officer, for this execution was not against individual members. If it had been so by a clear description, possibly the officer might have been excused, or have justified under his execution issuing from a court having jurisdiction in the case.

4 Mass. R.  
232, Nichols  
v. Thomas.

§ 25. This was *assumpsit* by the corporation against the deft. In this case after the company was incorporated, but

5 Mass. R. 80,  
Worcester  
Turnpike  
Corporation v. Willard.

CH. 22. before it was organised by electing its officers &c. the deft.  
 Art. 1. and others subscribed a paper severally, agreeing to take the  
 shares affixed to each name, "and to pay all such legal assess-

ments on each of said shares, as shall hereafter be made by the future government of the said corporation, after the same shall have been organised and carried into operation according to the act &c. on the condition contained in it, and (among others) so as to cross Charles river near the upper falls so called, at or near General Elliot's mills" &c. The corporation was afterwards organised and went into operation, and the said conditions were complied with, and four assessments were made. The deft. paid one of them and refused to pay the other three. In this action the corporation recovered on the express promise to pay, though the remedy provided for selling his shares for the payment of the assessments remained. The declaration was, "that in consideration the plts. at the deft's. request had admitted him to take one share in the capital stock of the said corporation, and to become a proprietor therein," he promised the plts. to take the share and to pay the assessments &c. No objection seems to have been made, that the plts. could admit or promise, or act at all on their part, till they were organised, and so that there could be no act on their part operating as the consideration of the promise. The court thought "that the deft. in consideration of becoming a proprietor of one share made a legal contract with the corporation," and expressly promised &c. But how did the deft. become a proprietor at the time of the promise when there was no organised corporation to admit him to become one? If he had been excluded his share by others taking the whole number, what remedy could he have had against the corporation on a bargain made with unauthorized individuals? It has been said, the corporation might elect to assume such a bargain, but if it would not be bound by it, as it was not, where was the mutuality, the consideration to make it valid?

If A subscribe for shares in a turnpike corporation, he thereby acquires an interest and it is a good consideration to support an action against him.—  
 1 Caines' R. 381.

R. 801.

6 Mass. Rep. 491, Gilmore v. Pope.

§ 26. This was assumpsit by the plt., an agent of a turnpike corporation for assessments. The deft. subscribed and engaged to pay the assessments on his two shares after the corporation was organised. The court held, that the corporation might maintain an action on the promise made to its agent, but that he could not; for as to him there was no consideration. A subscription made prior to, how renewed to a corporation, 14 Mass. R. 172, 176.

6 Mass. R. 40, Andover & Medford Corporation v. Gould.

§ 27. This was assumpsit to recover the amount of assessments on the deft's. turnpike shares, on the following subscription, to wit: "whereas the legislature has at the last session granted leave for making a turnpike road from &c., we the subscribers, desirous of having the same completed as



soon as possible, agree to take in said road the number of shares set against our names, and be proprietors therein." Judgment for the deft. And the court held, that when the members of such a corporation expressly agree to pay the assessment that may be made by the corporation, an action lies for it to recover the assessments; but if there be no such agreement, the sole remedy for the corporation is by a sale of the shares of the delinquent members. The same principle holds in a manufacturing company, and an assessment laid after incorporated.

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14 Mass. R.  
286.

§ 28. In *assumpsit* against Hay, a member, it was held, that his declaration at a public meeting of the corporation, that he would spend half of his estate, speaking of the expenses of making the proposed turnpike road, was no evidence of an express promise to pay the assessments on his shares, and that no action lay against him for the assessments. There was no consideration for this declaration, nor was it any promise.

7 Mass. R.  
102, 107.  
Same Corporation v. Hay.

§ 29. A corporation was created to lay and maintain side booms in convenient places in — river, it cannot enter on the land of one adjoining the river without his consent in order to lay the booms &c.

7 Mass. R.  
393, Perry jr.  
v. Wilson.

§ 30. The promissory note in this case was from the deft. to the plt., as agent of the Providence Hat Manufacturing Company, and so the action was brought. But held, an action lay for the plt. in his own right, and his styling himself &c. was *descriptio personæ*.

8 Mass. R.  
103, Buffum  
v. Chadwick.

§ 31. This was an action of *assumpsit* on a note of hand, dated Dec. 30, 1805, for value received, by which the deft. promised by the name and style of Gardner L. Chandler, treasurer of the Dorchester Turnpike Corporation, for himself and successors in office, to pay the plt. or bearer \$125 on demand, and interest till paid. He was sued in his own right; and the note was given for the proper debt of the corporation. The court decided, that he was not personally liable, for the corporation itself is clearly liable, and authorized the deft. by vote to give this note. Not like the case *Tibbets v. Walker & al.*, there the contract was under the seals of the defts., and they produced no authority to bind the corporation. See this case, Ch. 76, a. 2. The corporation is liable—the deft. is not. In this case the authority to the treasurer to bind the corporation was by vote. See a corporation's *assumpsit*, express or implied, 7 Cranch 299, 307, well considered.

9 Mass. R.  
336, Mann v.  
Chandler &  
al.

Bank of Columbia v.  
Patterson's  
adm.

§ 32. *Assumpsit* and *quantum meruit* against a number of persons who associated to get an act of incorporation for a bank, and at a regular meeting (not all present) the plt. was appointed their agent to obtain the act from the legislature. He did not obtain it; but held, the associates were all jointly

9 Mass. R.  
300, Sprout v.  
Forter & al.

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liable to his action for his services. That they knew expenses must be incurred of the sort, and that the jury might infer their assent jointly to pay them. Plea, never promised. The associates had subscribed their names in a book, and each to take so many shares. The plt. was a subscriber; one of the members at the meeting, acting as secretary, recorded the plt's. choice.

7 Mass. R.  
458, Stan-  
wood v.  
Peirce.

§ 33. The turnpike in this case was authorized to be from Bowdoin College to a certain place in Bath. The Sessions laid it out seventeen rods from the college buildings, and eight rods from the college lands, and the court decided it was well laid out. In an action of trespass the lands of the college were intended by the legislature, and as near to them as circumstances permitted.

8 Mass. R.  
292, Essex  
Turnpike  
Corporation  
v. Collins.

§ 34. *Assumpsit* for assessments on the deft's. four shares in this corporation. Judgment for him. For though he subscribed to take four shares and pay the assessments thereon, (after a part of the turnpike was completed,) yet there was no previous or after act of the corporation ratifying his subscription. It did not appear that General Foster, who procured the subscriptions on the paper, had any authority so to do from the corporation, or that it gave any after assent to it, or that it even knew of it. On the whole it was clear, that the deft. could have had no action against it for withholding certificates of ownership, no act by which it was bound to admit him as a member, so there was no consideration to bind him &c.

10 Mass. R.  
430, Eager &  
al. v. The In-  
habitants of  
Marlborough.

§ 35. *Assumpsit* by the plts. as agents of the town of Marlborough for expenses incurred by the whole town in building a meeting house, and the plts. recovered. The objection was, that after the expenses incurred, and before the commencement of this action, a number of the inhabitants were incorporated into a second parish in Marlborough. The meeting-house not being included in that parish, but remained the property of the first parish in Marlborough. The objection was founded on the fourth section of the statute 1786, Ch. 10; and the plt's. relied on the proviso in the same act. The meeting-house was for the benefit of all the inhabitants of the town *when built*.

10 Mass. R.  
476, Quiner v.  
Marblehead  
Soc. Ins. Co.

§ 36. *Paying in shares*. *Assumpsit* for money had and received, second count for, also Dudley S. Broadstreet & William Story were indebted to Benjamin T. Reed, and to recover his demand &c. he caused to be attached 150 shares of the capital stock subscribed by them in the Marblehead Social Insurance Company and sold to satisfy his execution, and thereon the plt. purchased them for \$— a share, and notice thereof being given to the defts. they became obliged to admit him &c. The statute incorporating this company

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provided, that no transfer of any share in it should be valid, until the whole capital stock should be paid in. D. S. Bradstreet for himself and partner, previously to the attachment, transferred these 150 shares *bonâ fide* to Isaac Story, and before all the stock was paid in. He was their creditor, and the transfer to him was in satisfaction of his debt. Held, they transferred to him the equitable interest so far as to justify the corporation in issuing the certificate of shares to him, and to consider him the true owner when all the stock was paid in. 2. Held, that such a transfer might be in writing not under seal. And hence, where one had subscribed for shares in the name of the firm, and had paid the instalments out of the funds of the partnership, he could transfer the shares without a power either general or special from his partner. When Reed attached, he was informed the shares had been so transferred to Isaac Story, and a copy of the bill of sale (under seal) to him after the attachment, but before the sale to the plt. on the execution, was left at the office of the company. William Story had been absent in Europe all this time, and was not consulted as to the subscription or transfer. These shares were partnership stock, so under the controul of each partner; nor was it necessary the transfer should be by deed under seal. But they passed by "the delivery over of the certificates with an endorsement on them by Bradstreet," as far as a *chose in action* could be transferred by law. The intent of the legislature in the prohibition was only to prevent speculations in the scrip &c., and not intended to prevent a debtor's *bonâ fide* transfer to his creditor.

§ 36. This was *assumpsit* to recover \$100 the debt. subscribed towards erecting this academy. And sundry other persons also subscribed in like manner, and afterwards the legislature incorporated them and constituted certain trustees, the plts. a body politic, and the act provided, that all monies &c. subscribed should be demanded, received, and held by the said trustees, in trust for the academy. Held, the corporation could not maintain *assumpsit* upon said agreement against a subscriber for the money by him subscribed; for the plts. were not the promisees, not existing when the promise was made, nor is it negotiable, nor is it transferred by the act. On the whole the subscription paper is no contract, no mutuality in it, no parties, no consideration. This paper was thus; July 1, 1808, "impressed with a sense of the advantages arising from free schools; we the subscribers agree to pay or cause to be paid the several sums affixed to our names in money or materials for erecting an academy in Limerick, on such land as may be given by any subscriber, and adjudged the most convenient and central by a majority of the subscribers." This

11 Mass. R.  
113, Trustees  
of Limerick  
Academy v.  
Davis.

CH. 12. subscription was a mere offer of a donation not in itself binding as a contract.

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11 Mass. R.  
288, North-  
ampton  
Bank v. Pe-  
poon.

11 Mass. R.  
94, Spear &  
al. v. Ladd.

37. *Assumpsit* on a promissory note made by the deft. January 8, 1809, payable to the Berkshire bank, and by them endorsed to the plts. Held, the directors of said bank had power to authorize one of their members to assign over this note. 2. That a blank endorsement made on it by him was sufficient.

§ 38. A president of an incorporated bank may under a vote of the directors endorse a note made to the president, directors, and company or order, and thereby pass the property to the assignee. No seal necessary to the assignment. The court observed, "the act of incorporation gives the general management of the property and concerns of the bank to the directors."

4 Cranch  
384.—  
5 Cranch 45.

§ 39. Act of Virginia incorporating the bank of Alexandria is a public act. *Young v. Bank of Alexandria*. Said bank may sue the endorser of a note made negotiable at it, without suing the maker and proving him insolvent, and may have a trial at the return term of the writ.

Chadwick v.  
Haverhill  
Bridge & al.

Case lies against a corporation for a tort, see Ch. 67, a. 4, which was for a corporation's building a bridge, and thereby taking from the plt. the tolls of his ferry—a *misfeasance*. And see *Riddle's case*, Ch. 143, a. 5, against a corporation for *nonfeasance* and many cases of *misfeasance* there cited.

Bro. Corp. 63.  
—Raym. 152.  
—6 Mod. 183.  
—10 Co. 32.—  
Brownl. 175.  
—Salk. 192.

It is undoubtedly true, that *trespass vi et armis* does not lie against a corporation. The principal reason is, the judgment is with a *capiatur* at common law. And a *capiatur* cannot lie against a corporation. Nor does *trespass vi et armis* in any case lie against a corporation, or any action in which any part of the process is arrest or attachment of the body. Nor any action against it as in custody, for it cannot be in custody. Nor any action against it where there must be *outlawry*, as a corporation cannot be outlawed. Nor does *replevin* or an action for a disseising, as is said in some books, but these books are of questionable authority. But no case is found in the books to shew that *trespass* on the case does not lie against a corporation in which no *capias* lies, and no process to take the body. And to shew case does not lie against a corporation it must be shewn a *capiatur* may be entered. Even some actions of *trespass* may lie against one if there be no *capiatur*. For a "corporation may be fined on an indictment," and "the fine levied by distress." The fine must be for some tort and unlawful act, and if fined it may be *amerced*. It has been held, that a corporation may be liable in *assize*, as a disseisor with force; also held, an aggregate corporation may be liable in *trespass* for distraining the plt's. cattle, until he paid a toll

Riddle's case.

31 Ass. p. 19.  
8 H. VI. 1, 14,  
6.  
Theloall's  
Dig. lib. 4,  
Ch. 13.

he was not bound to pay. So it has been decided, trespass lies against one for disturbing the plt. in his liberties ; or for disturbing him in holding a *leet*. Hence, our court observed, that some actions of trespass lie against an aggregate corporation at common law, as in them no *capiatur* was entered, and "the omission of this entry can be no objection to actions of trespass on the case."

Thus it is clearly settled a corporation is liable in case for a tort in a *nonfeasance* where the proper plea is *not guilty*, and so it seems it is liable for a *misfeasance*. *Nonfeasance* and *misfeasance* are the same as to this action ; both are in tort. Plea in both is, not guilty. Same judgment in both, and no *capias*, *exigent*, or *capiatur* in either. Hence they may be joined in one action.

§ 40. Twenty years' quiet and peaceable possession is a bar to information in the case of corporation elections.

§ 41. Corporations by their consent are distinguishable from corporations of districts made without their consent or *quasi* corporations, as counties and hundreds in England, and counties, towns, &c. here. No private action lies against one for a breach of duty at common law. This is true so far as they have no corporate funds and no means to obtain any ; though a corporator may in some cases be liable on the contract on the execution against it, yet it is conceived he cannot on it be liable for the tort of the corporation, but it is liable only and to the extent of its funds. In this case the action was against the corporation for not repairing and clearing a certain creek, as it used immemorially to do, by which the plt., Turner, lost his navigation. By creek is not necessarily intended a highway.

§ 42. So it is laid down in some books, that trespass on the case lies against a corporation for making a false return, though unquestionably a misfeasance. And this is not going in this respect farther than in several other cases, above cited. See also *Rich v. Pilkington*, Carth. 171.

§ 43. In this case of the corporation of Faversham, a fishing corporation, it was held, that no action lies against individuals for acts erroneously done by them in a corporate capacity to the plt's. damage, at least not without proving *malice*, which one of the court defined to be *one's own conviction he is doing wrong*, and *malice* must be proved as well as laid.

§ 44. The returning officer refused the plt. a vote in an election. Plt. was non-suited, because he did not prove *malice*. The election was of members of parliament ; for the mayor was compellable to act. The declaration stated *malice*.

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2 Wils. 319,  
Dickon v.  
Clifton.

Loft. 552,  
R. v. Ports-  
mouth.  
2 D. & E.  
667, Russell  
& al. v. The  
Inhabitants  
of the county  
of Devon.

Cowp. 86,  
Turner's  
cases, and  
cases above,  
and post.

1 Kyd on  
Corp. 450,  
Rex v. Cor-  
poration of  
Reppon, cites  
1 Ld. Raym.  
563.

1 East 565,  
Harman v.  
Tappendin.—  
8 D. & E.  
352.

Drew v.  
Coulton, at  
N Prius, and  
Ashby v.  
White.—Salk.  
19.

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Art. 1.

1 Wils. 281,  
Innholder's  
case.

14 Mass. R.  
214, Halli-  
burton v. In-  
habitants of-  
Frankfort.

15 Mass. R.  
505, Vose v.  
M

Enough he acted to the best of his judgment, though mistaken in point of law.

§ 45. Debt on a by-law for not paying 2s. annually, quarterly, the breach need not assign the days of quarterly payments. No particular days were assigned for the quarterly payments to be made.

§ 46. Held, an inhabitant of a town could not have *assumpsit* against it for payment for cattle he furnished to the public enemy at the request of its selectmen and others of its citizens, in compliance with the exactions of that enemy on the town, and to prevent his threatened violence, Sept. 1814. There was no vote of the town.

§ 47. *Banks—case against Grant on his liability as a stockholder and creditor of the Hallowell & Augusta Bank.* Held, not liable for the debts of the corporation, though the stockholders after the charter expired divided the capital stock among themselves, leaving no corporate funds sufficient to redeem their outstanding bills. The plt. sued the deft. as for a tort. The declaration charged, that the deft., the directors and stockholders intending to defraud the plt. and other holders of their bills, did not preserve funds nor provide means to pay them; but that they neglected, disregarded, and violated their duty &c. And that the said directors and stockholders on — did make, fraudulently and wrongfully, a division of three-fourths of their whole original stock among the stockholders, &c. That the deft. fraudulently and wrongfully received \$3000, his proportion of the said division. That after it no part of the original stock was remaining in said bank &c. That the corporation was insolvent &c. That the plt. was owner and holder of its bills &c. \$1081, demanded payment of the bank &c. There was no proof of misconduct in the deft. as a director, nor as a stockholder, unless in receiving the said proportion, and this at a time when it was believed the remaining quarter and debts due to the bank would be sufficient to pay what it owed. The bank became insolvent by the after failures of Porter & Dummer, two large debtors to it. On the whole this case does not seem to have been in a state correctly to settle any general principles. The plt. became possessed of his bills in the year 1816, and the said division was made in the year 1813. The court decided on general ground; that is, if the stockholders were liable to their creditors, they were not on the ground of tort so severally each for the whole injury, but on contract, and each for no more than he received. Perhaps no remedy exists but in a court of chancery, and the reasons stated.

Mass. Acts.

§ 48. *Banks restrained in several ways.* Massachusetts act, June 22, 1799, prohibited unincorporated banks; not

allowed to issue bills under \$5 &c. ; but by act of June 15, 1805, allowed in a limited manner; to make statements to the Governor and Council twice a year; act March 8, 1803, what specified in them, act March 14, 1806; weights to be annually proved, act March 9, 1804; required to adopt the stereotype steelplate &c., act March 4, 1809, and June 20, 1809; to enable banks to close their concerns, acts June 24, 1812, Dec. 14, 1816. Banks to make bills payable only where issued, and in specie, act Dec. 13, 1816, and Mass. act June 20, 1809.

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Mass. Act.  
See Ch. 76, a.  
2, s. 12,  
Brown's case.

§ 49. *Insurance Companies &c.* incorporated. Their powers and duties and restrictions defined, act Feb. 16, 1818. Further provisions for calling meeting of banks and insurance corporations; the cashier or secretary may do it on the application in writing of the proprietors of twenty per cent. of the capital stock, giving such notice thereof as the charter requires, act June 19, 1819. All corporations established whose powers would expire by limitation or otherwise, are continued corporations for three years from the time of such expiration, "for the purposes of prosecuting and defending all suits, which now are or may hereafter be instituted, and of enabling them gradually to settle and close their concerns, and divide their capital stock; but not for the purpose of continuing the business for which such bodies corporate and politic have been or may be established," act June 19, 1819.

Mass. Acts.  
Act Feb. 16,  
1818, Laws  
of Maine, Ch.  
139.—Act  
1819, Laws  
of Maine, as  
to Banks,  
Appendix, pp.  
648, 663, also  
Chs. 142,  
145.

§ 50. *Manufacturing corporations.* This act defines the general powers, duties, and liabilities of the corporations that shall be established, and gives them power to choose a clerk at a meeting called &c. to be sworn by a justice of the peace "to the faithful discharge of his duty, and who shall record all votes of the corporation in a book" &c. "A treasurer who shall give bonds in such manner, and in such a sum as the corporation shall direct, and such other directors, agents, and factors as shall be thought necessary, and convenient for their regular government, and to carry into effect the several objects for which any such corporation may be established, and to make and establish any rules and by-laws for the regulation and government of said corporations with reasonable penalties for the breach thereof," not exceeding \$20, and the same at their pleasure to repeal; not repugnant &c. Sect. 2 directs how the first meeting shall be called. Sect. 3 directs the property be divided into shares, and certificates given &c. Sect. 4, how shares may be sold by deed acknowledged and recorded by the clerk. Sect. 5 directs how assessments may be made upon each share &c., collected &c., and if not paid in thirty days how enforced by auction sale of the share in the usual way; giving the purchaser a new certificate. Sect. 6 is

Mass. Act,  
March 3,  
1809.—Laws  
of Maine, Ch.  
137. As to  
Turnpikes,  
Ch. 138.

CH. 22. new generally, and directs, that when the corporation is sued  
 Art. 1. in a civil action and execution issued against it, and not satisfied in fourteen days after demand by the officer on the president, treasurer, or clerk, then on such default the officer having the execution "shall serve and levy the same writ or execution upon the body or bodies, and real or personal estate or estates of any member or members of such corporation, Sect. 7 makes all acts incorporating manufacturing companies public acts, and reserves a right to the legislature to alter the system on due notice &c.

Mass. Act,  
 Feb. 24, 1818.

This act of 1818, gives the remedy against the body or bodies &c. on an *alias* execution issued; and also against the body or bodies, and estate real and personal of "any person or persons who were members of said corporation at the time when the debt or debts accrued upon which such writs or executions may have issued." This act enacts, that "every person who shall become a member of any manufacturing corporation, which may hereafter be established within this Commonwealth, shall be liable in his individual capacity for all debts contracted during the time he continues a member of such corporation." This making the individual members personally liable for the debts of the corporation, however in fact uninformed of them, and at any distance of time, is new and important. These acts are all affirmative. The act of 1809 is against those members when the execution is levied; is this provision repealed? This is important in buying shares. The act of 1818 is the same on an *alias* also against those members when the debts accrued. The act of 1822 is against those members when the debts were contracted. Does not then the remedy lie against all the members individually, such when the debt was contracted, and when it accrued, and when the execution is levied; and as the act of 1818 is against the estates of those who were members &c., are not their estates liable after they are dead, and even their estates settled?

Mass. Act,  
 Jan. 28, 1822.

Mass. Act,  
 Feb. 20, 1819.

§ 51. *Agricultural and Manufacturing Corporations.* This act is merely to encourage such corporations as give the required attention to agriculture and manufactures by giving premiums &c. And the state gives bounties to those corporations made for these purposes, and which establish private funds to a given amount; each corporation extending to a county or counties containing 30,000 inhabitants. The public bounty is usually one-sixth part, and private funds five-sixths. And this act extends to no association less than a county.

Currie's adm.  
 v. Mutual Assurance Society against Fire, 4 Hen. & M. 315.—Authorities cited, Dom. Civil Law 153.—Pothier on Obligations 565.—Mars. on Ins. 195.—Brown's cases 68.—3 Bac. Abr. 367.—Co. L. 264.—4 Bl. Com. 478.—6 Vin. 270, 296.—Cro. J. 554, *Obrion v. Knivan*.—And: 173, the *King v. Lislie*.—2 Bac. Abr. 2.—12 Mod. 253.—3 Bac. Abr. 16, 51.—1 D. & E. 3, *Rex v. Staty*.

§ 52. *How far a state legislature can annul or alter acts*



*of incorporation.* 1. Held, a member of this society is bound by an act of the assembly, (Virginia,) varying the terms of the original act of incorporation. Such act being enacted at the instance of a legal meeting of the said society, though that individual member was not present at the meeting. 2. If an act of incorporation provides there shall be "three directors, out of whom a president shall be chosen," he may be elected at a legal meeting and when the other directors are chosen without having been previously appointed a director. The alteration was to separate the interests and risks of the inhabitants of the country from those of the towns, it being found that the risks in towns were much the greatest, also to lessen the number of directors. The assessment disputed by Currie was on the town members for half of a quota, but not on the country members. So increased his risks, as he said, without his consent. The authorities relied on in the case clearly show the decisions in it were made on English common law authorities, adopted in Virginia; so generally the principles of this case are principles existing in all our states settled under English laws. 26 Vin. 344; Burr. 1656, 1661; Stra. 314; 2 Kyd on Corp. 100, 200; 1 Bl. Com. 485; 3 Burr. 1386; 2 Stra. 1091; 1 Kyd on Corp. 312, 451; 16 Vin. 113; 4 Com. D. 153; 1 Rev. Cod. 58; 1 Kyd on Corp. 401; 1 Bl. Com. 476. The constitution of the United States as to impairing contracts, if it had any bearing, it was very remote, 4 Burr. 2120, *Rex v. Dawes & al.* The material principle settled in this case was, that a legal change could be made in a corporation by its corporate consent, and an act of the legislature, without the consent of each and every individual member. It was a part of this case that each member might withdraw giving six weeks' notice, and paying existing assessments. But it is doubtful if this circumstance was of any weight, as the unequal half quota was required only twenty-seven days after the charter was altered, and within the six weeks.

Comment. Though the report in this case occupies above forty pages, we have to inquire, for what purpose this half quota was assessed? Was it to make good some loss by fire which happened before the said alteration in the charter, made Jan. 29, 1805, or which happened after that was made? If before, the decision was clearly wrong. It is perfectly clear, that if rights vest in persons by the laws and contracts in force at the time, they cannot be divested and transferred from them to other by corporate votes or legislative acts, or both without such persons' consent had in some form. It is equally clear as to burdens or charges fixed on persons by the laws and contracts in force at the time; they cannot be transferred from them to others, and put upon them by such votes or acts, or

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CH. 22. both, without such other person's consent had in some form.  
Art. 1. There is a material distinction between property corporation, as insurance, bank, turnpike, canal, &c. and mere governmental corporations, as towns, cities, &c. These are established merely for the purposes of political and municipal government, and may be made or altered by the legislature without individual consent, as is every day's practice, and often altered without corporate consent, because they are only a mere incorporation of powers for the convenience of those immediately incorporated and of the government. They do not vary individual rights, nor are they founded on any contracts previously made by the incorporated. They may settle on the same tract of land, independently of each other, and be incorporated into a town, without entering previously into any contract whatever among themselves. The case is very different with such property corporations. In the very nature of the case the first act of the members is an express contract among themselves to create their capital stock, to manage it and to share the profits; by this they fix exactly what each one is to do and receive. In making this, each individual is an independent party, who can sue and be sued, and while few in numbers they can well, and often do execute the contract without any incorporation, and when incorporated, their incorporation is a mere corporation of powers, a grant or gift of the legislature to enable them to manage their property or stock with more convenience. But no vote of a majority, nor any corporate vote or legislative act, or these altogether, can vary the terms, and rights, and burdens fixed by such contract without the consent of each and every such independent party, expressed or implied in some form or manner. It is true they can provide in this contract, that the terms of it may be altered by a majority or by a legislative act, or by both, or in other manner, and this will be the individual consent of every one, who signs it, to the alteration. But no such consent appears in Currie's case. The case might be different if the half quota was assessed to indemnify a loss, or to satisfy some charge arising after said alteration in the corporation was made, and he was liable to pay his assessment if he might have avoided it by withdrawing. The principles and distinctions noticed in this comment are essential to be attended to in all cases of corporations.

## CHAPTER XXIII.

## ASSUMPSIT. CARRIERS.

ART. 1. *All persons carrying goods for hire are common carriers.* § 1. And if they refuse to carry goods or money, having conveniences so to do, an action will lie against them, and all carriers are bound to deliver goods to the persons to whom directed. Bul. N. P. 70; 12 Mod. 3, 482. But one is not a common carrier who engages, though for hire, to carry the goods of a particular individual.

See Bailment, above.  
—1 Salk. 249.  
Imp. M. P.  
290.—Owen  
67.—Allyn  
93.—Hob. 18.

§ 2. And if goods or monies be delivered to a common carrier, he is under a contract in law to pay or carry them to the person appointed; and if he do not, an action of *assumpsit* lies against him. And such is a master or owner of a ship, hoyman, stage coach, &c.

Imp. M. P.  
291.—Jones  
144, 149.—  
1 Com. D.  
288.

§ 3. In this action there is in the nature of things some mixture of contract and tort, or contract and neglect, or *non-feasance*. Nor has it ever been decided which preponderates. There is clearly an express or implied promise to perform the intended service, and the failure to perform is the neglect; and this is sometimes attended with carelessness, and even fraud. And so may the case be circumstanced, that the injured party may often have his election to ground his action on the *assumpsit* or on the tort. A carrier may plead *non assumpsit*, or according to many cases, not guilty. This action is founded on some particular parts of the common law, often called the custom of the realm. But every thing peculiar in this action against carriers has resulted from the nature and necessity of the case, and a great object has ever been to prevent fraud.

1 Selw. 323.—  
See Clarke v.  
Gray, Ch.  
175, a. 6. See  
Gray v. Port-  
land Bank,  
Ch. 76, a. 2,  
s. 11.—  
8 Mod. 178,  
Harrison v.  
Green.—  
Hob. 17, 18.

§ 4. In this action of Garside against the proprietors of the Trent and Mersey Navigation, the defts. were charged as common carriers of hops from Stourport to Manchester, thence forwarded to Stockport, on their undertaking for the plt. Neglect in not sending them from Manchester to Stockport. The hops were directed to the plt. at Stockport, and delivered to the defts. to be carried from Stockport to Manchester; where they arrived safe, and there were put into the deft's warehouse, and there were burnt by accident, the first night after put there, and before any carrier came from Stockport to whom they could be delivered. The defts. in the course of their business charged nothing for thus lodging goods in their warehouse. Judgment for the defts., who in

4 T. R. 682,  
Garside v.  
Proprietors  
of the Trent  
and Mersey  
Navigation  
Company.

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2 Ld. Raym.  
See Bail-  
ment, Jones  
144.—Doct.  
& Stud.

1 Inst. 89.—  
Jones 145,  
146.

Bul. N. P. 70.  
71.—4 Burr.  
2301.—Co. L.  
89.—8 Co.  
84.—5 T. R.  
389, Hyde v.  
Navigation  
Company  
from Trent to  
Mersey.

6 T. R. 369,  
Biddle v. Wil-  
son.—1 Wils.  
282.—3 Wil-  
son 429.—  
Salk. 282.—  
Cowp. 376.

Govitt v.  
Radnidge &  
al.

this matter were viewed as mere warehouse men. Had they been considered as carriers they would have been viewed as responsible as insurers, and to prevent fraud ; the keeping the goods in the warehouse was for the benefit of the owner. Carrier may detain goods for the carriage.

§ 5. By the common rules in bailment a carrier for hire ought to be responsible only for ordinary neglect, and in the time of Henry VIII. it was generally so holden. And the rule seems to have been, “ that a common carrier was chargeable in case of a loss by robbery, only when he had travelled by ways dangerous for robbing, or driven by night, or at any inconvenient hour ;” that is, had been guilty of some ordinary neglect at least.

§ 6. But as early as the time of Elizabeth the law was settled as it now is, and if the carrier was robbed it was held, he was answerable for the value of the goods. And as the law now is, “ nothing will excuse him except the act of God or of the king’s enemies.” Not as Lord Coke says, because of his hire ; for that, as before stated, only makes him answerable for his ordinary neglect. But on principles of sound policy, lest being allowed the excuse of robbery &c., he might confederate secretly with robbers and desperate villains. The act of God is better expressed by inevitable accident ; and the king’s enemies are his public enemies, not rebels. See post, art. 4. This case is consistent with that of Garside. In this case the defts. were not carriers between Manchester and Stockport, but their transportation as carriers terminated at Manchester ; and if they engaged any further, it was only to see the hops delivered to another carrier between Manchester and Stockport.

§ 7. In this case the court held, carriers were liable on contract, and must be joined when the action is on their undertaking. It is *ex contractu* ; and the declarations are generally on the undertaking and *assumpsit*. There can be no doubt but that this action against carriers may often be *assumpsit*, when all the carriers must be joined, and the plea is *non-assumpsit*, as if a carrier for a valuable consideration undertake to carry my goods to Boston, and refuse to receive or carry them, I may have *assumpsit* against him.

§ 8. But also this action against a carrier may be founded on *tort*, and the undertaking of the carrier be considered as matter of inducement in the action, and the negligence as the gist of it, then the plea is, not guilty ; and if brought against two defts. one may be acquitted, and judgment against the other.

As in 3 East 62 to 70 ; the declaration stated the defts. loaded the plt’s. hogshead of treacle on their cart for a certain

reasonable reward, to be paid by the plt. to two of them, and other such reward to be paid by the plt. to the third deft. ; yet they so carelessly, negligently, &c. conducted themselves in the loading of it &c., that in loading it the same was let fall, broke, and damaged, and lost. Plea, not guilty. Verdict against Rodnidge with damages, and the other two defts. were acquitted, and judgment accordingly, after a motion in arrest of judgment, on the ground the gist of the action was *tort*. In this action most of the cases on this point were cited and considered, as 2 Wilson 319, in which case a like count was joined with one in *trover*, and held well, being *ex delicto*, and not *ex contractu*, though arising out of a contract. So 2 Ld Raym. 909, respecting the hogshead of brandy, which see, post. On the other side in favour of the actions being on contract were cited Buddle v. Wilson, and Dale v. Hall, 1 Wils. 282, in which case the declaration was in *assumpsit*, and the plea *non assumpsit*. Lord Ellenborough C. J. said, there is no inconvenience in allowing the plt. to allege his *gravamen* if he pleases, as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire.

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Duhon v.  
Clifton,Coggs v. Bar-  
nard.

“ By allowing it to be considered either way, according as the neglect of duty or breach of promise is relied upon as the injury, a multiplicity of actions is avoided ; and the plt., according as the convenience of his case requires, frames his principal count in such a manner, as either to join a count in *trover* therewith, if he have another cause of action for the consideration of the court, other than the action of *assumpsit*, or to join with the *assumpsit* the common counts, if he have another cause of action to which they are applicable,” as for money had and received &c.

ART. 2. *In what cases assumpsit lies against carriers or not.* § 1. This was a declaration in *tort* against a carrier, alleging that he undertook (without saying for hire or reward) safely to take up certain hogsheads of brandy out of a cellar and deposit them in another, but that he so negligently &c. put them down, that one of them was staved. Plea, not guilty, and verdict for the plt. And on a motion in arrest of judgment, the declaration was held to be good ; for the gist of the complaint was *misfeasance*. And Gould J. said, the declaration was good either way in *assumpsit* or *tort*. See the declaration at large in 2 Show. 478, in *Boson v. Sanford*.

§ 2. The declaration was, that the deft. at the plt's request undertook to carry certain goods from such a port to such a port, and in consideration thereof the plt. promised to pay him

Salk. 785,  
Coggs v. Bar-  
nard.—2  
Show, 478.—  
2 Ld. Raym.  
909.1 Wils. 281,  
282, Dale v.  
Hall.

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so much money. That the goods were delivered to the deft. on board his boat, and that he kept them so negligently they were spoiled. Plea, *non assumpsit*. Proof, the goods were damaged by water and rust; that rats made a leak by which it happened; that the deft. pumped and did all he could to prevent the evil. Held, the deft's. evidence was not admissible; that he was to carry for hire, and safely, which was no more than the law implied. The law says, "every thing is negligence in a carrier or hoyman, that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the act of God or the king's enemies.

Hob. 30.—2  
Cro. 330.

§ 3. So if a hoyman be robbed, he is liable for the reason above mentioned, to prevent confederacies and frauds.

Jones 149.—  
1 Stra. 145.—  
Burr 2298,  
Gibbon v.  
Poynton &  
al.—1 Bac.  
345.—Bul. N.  
P. 71.—  
Lyon v.  
Metts.—  
Carth. 458,  
Tyly & al. v.  
Morrice, cit-  
ed 4 Burr.  
2301.—1  
Selw. 328.

§ 4. So a carrier is liable for the loss of a box, though he be ignorant of its contents, unless he make a special acceptance; but the bailor may lose his action by fraud or by imposing on the carrier. As when money sent by a stage coach was hid in hay in an old mail-bag by the bailor, to avoid the price of carrying money; the law will not allow the bailor to take advantage of such a fraud. See 6 East 564, Clarke v. Gray.

§ 5. After several cases as to fraud and concealment by the bailor were decided, it was in this case held, "that the carrier was liable only for what he was told of." The carrier was told there was in the bags £200, (these being sealed up) he gave a receipt for so much. He was robbed. And the court held, he was liable only for the £200, and that the plt. was guilty of fraud. Held "a common carrier insures the goods at all events," and it is right. But said Yates J., surely he ought to know "what it is he undertakes, he ought not to be liable where he is deceived." In this case Lord Mansfield and the court went on the principle, that a carrier is answerable by reason of his reward, and ought to have a price according to the risk. And the case of Kenrig v. Eccleston, Allen 93, was denied to be law.

Id. Raym.  
220, Mors v.  
Slew, cited  
Jones 152.—  
1 Selw. 323.  
1 Bac. Abr.  
344.—1 Com.  
D. 289.—1 T.  
R. 18, 27, 33.  
Sutton v.  
Mitchell.  
1 T. R. 27,  
Forward v.  
Pittard—1  
Cranch, 345.  
What is the  
act of God?

§ 6. A ship was lying in the river Thames within the body of the county, and "eleven persons armed came on board of the ship in the river, under pretence of impressing seamen, and forcibly took the chests which the deft. had engaged to carry." "And though the master was entirely blameless," Hale and the court held, he was liable; but otherwise as to storms, pirates, &c. at sea. Abbott 182, 202; Hob. 17; Cro. J. 330.

§ 7. A carrier is in the nature of an insurer. Hence, he is, when undertaking for hire, bound to deliver the goods at all events, except damaged or destroyed by the act of God or the

king's enemies, even though the jury expressly find that they were destroyed without any actual negligence in the carrier. CH. 23.  
Art. 3.

§ 8. A box of jewels was delivered to a ferryman who did not know what it contained, and a sudden storm arising in the passage, he threw the box into the sea, and the court held, he was liable; but Jones adds a quære. Jones 151.—  
Allen 93.

Held, if A travel in a stage coach, and takes his portmanteau with him, though he has his eye on it, yet the carrier is liable if it be lost. And if a coachman carry goods for hire he is liable as a common carrier. 2 Bos. & P.  
419, Robin-  
son v. Dun-  
more.

§ 9. The plt. delivered goods to the deft., a common bargeman, to carry for hire, and he so negligently kept them they were stolen. Plea, the deft. delivered to A to carry them by the plt's. consent, who discharged the deft. of the carriage. The plt. denied the discharge. Demurrer and judgment for the plt.; for the delivery by his consent was not material, but on *the discharge* on this issue. Goods left in an inn-yard whence the carrier starts is no delivery to him. Cro. Jam.  
330, Rich v.  
Kneeland.—  
  
1 Ld. Raym.  
46.

ART. 3. *Where a carrier is not liable.* He is not liable where deceived as above. So he is not liable where there is some inevitable accidents; as where the deft's. hoy coming through a bridge was driven against it by a sudden gust of wind. This was the act of God, which no care could foresee or prevent. And it is sufficient the hoy or boat be such a one as will probably perform the passage without any extraordinary accident. Bul. N. P. 69,  
Amies v. Ste-  
vens, cites  
Stra. 128,  
post. art. 7.

§ 2. So if a pipe of wine upon the ferment burst in the wagon when gently driven; for the fault is in the wine, and the insurer does not insure against the defects of the thing itself. Bul. N. P. 69.  
Farrar v.  
Adams.

§ 3. So if I send my servant with the goods on board the vessel, and he locks them up and they are lost, the carrier is not liable, for they are not to be viewed as in his keeping, but in the keeping of my servant. But see Robinson v. Dunmore, post. Bul. N. P. 70,  
E. I. Comp.  
r. Pullen.—  
Stra. 690.

§ 4. So if the driver of a stage coach, which only carries passengers for hire, loses their goods, the master is not liable; and if the servant receive a gratuity for carrying the goods it makes no difference; for it is not in the course of his business. But when goods as well as passengers are carried for hire, then the master is a common carrier, and liable to answer for the goods. Bul. N. P. 70.  
—1 Bac. Abr.  
343.—2  
Show. 128.—  
Salk. 282.

§ 5. So if I and several others be in a ferry boat, and when on the water a tempest arises, and all in much danger of being drowned; upon which to preserve the lives of those on board, goods, and among the rest, mine, of great value, are thrown overboard; the boatman is not liable, and I can have 2 Ld. Raym.  
918.—Stra.  
128, Amies v.  
Stevens.—  
Mouse's case.  
12 Co. 63.

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no action against him. But perhaps all the different cases must be reconciled on this distinction. If the tempest was *reasonably to be expected*, then the ferryman was liable; for he then ought to have prepared for it: but if not so to be expected, but the tempest was sudden, then it must be viewed as an *inevitable accident*, and the ferryman not liable.

Garside v.  
Trent, Nav.  
Comp. above.

§ 6. This was *assumpsit* against a carrier, and the goods were burnt by an *accidental fire*. Judgment for the defts. as above.

5 Bac. Abr.  
263.

§ 7. Nor is a carrier liable for not delivering goods, till he is paid his hire; for he has a *lien* on them, and has a right to retain till he is paid his hire; and as he is bound to carry goods, so he has by law a *lien* on them for his hire in carrying them, but no farther.

1 Selw. 337.  
—6 East 519.

1 H. Bl. 298,  
Clay v. Wil-  
lan & al.

§ 8. So if a carrier, by printed articles, gives notice that he will not be liable for certain valuable goods, if lost, of more than the value of a specified sum, unless entered and paid for as such, and one knowing the conditions delivers such goods above said value, and conceals the value, and pays only the ordinary price of carriage and booking; the carrier is not liable to the extent of the sum specified, nor to repay the sum paid for the carriage and booking.

Bul. N. P. 36.

§ 9. "If a tradesman, in London, send goods by order to a tradesman in the country, by a carrier not named by the country trader; if the carrier embezzle the goods, the country trader must bear the loss." The reason of this case does not readily appear.

2 B. & P. 416,  
Robinson v.  
Dunmore.

§ 10. If A order goods to be sent to him by a particular carrier, though on condition to return them, if he dislike them, yet, on delivery to the carrier, the property is vested in A, and he must pay the price and bear any loss. A carrier, who warrants the goods to go safe, is liable, though their owner send his servant in the cart to look after them.

5 T. R. 389,  
Hyde v  
Trent Navi-  
gation Com-  
pany.

ART. 4. *When the carrier's trust ends, &c.*

§ 1. The defts. were *common carriers* from Gainsborough to Manchester. The defts. charged and received cartage of the goods to the plt's. house, the consignee's house in Manchester, from a warehouse there, where the defts. usually unloaded, not belonging to them. They were held to be liable for the goods destroyed by an accidental fire in this warehouse; though they allowed the profits of the cartage to a third person, and this was known to the consignee; and the court held that *carriers* are liable in all cases but two, being as *insurers*. The defts. here were to carry the goods from said warehouse to the plt's.; for by their said charge, it appeared the third person acted under them, and then his act was theirs.



§ 2. The defts. were *common carriers* from Birmingham to London. June 7, 1771, they received a box, containing 119 yards of silk, directed to Mr. James Ireland, Prince street, Spitalfields, London; the said box came to the defts'. warehouse in London, June 8, 1771 with no legible directions on it, where it remained a year. When the plt. and Ireland settled their accounts, they found the box had been sent by the Birmingham coach, and not delivered. They found the box in the warehouse, and the silks damaged £29 14s.; and the deft. Manning, refusing to make any satisfaction, he was sued. The defts. neither delivered the silk, or gave any notice to Ireland; his name and place of abode were in the directory; the defts. had made no enquiry where he lived, and, usually, hired a porter to carry out the goods that came by their coach and received the portage. Judgment for the plt.; for carriers are bound to give notice in a reasonable time, to the person to whom the goods are directed, of their arrival; and must take special care they deliver them to the right persons. In this case the carriers remained liable a long time, and until the goods were properly disposed of.

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Art. 5.

3 Wils. 429,  
Golden v  
Manning.

§ 3. So an action against a carrier does not always die with him, but lies also against his executors or administrators, for the goods lost by him. But this must be understood to be the case, only where the bailor has an election to sue the carrier in *assumpsit* or *ex contractu*.

5 Mod. 92.—  
1 Com. D.  
334.

§ 4. The defts. contracted to carry the plt's. goods from Liverpool to Leghorn. The vessel was *embargoed* at Falmouth in the voyage two years. Held, that after the two years expired when the embargo was removed, the defts. were answerable to the plt. in damages, for not performing their contract. The embargo was laid only till the further order of the king in council; was only a suspension of the contract; did not terminate it, nor was the liability of the defts. at an end by the embargo, but only suspended by it. No offence against our embargo law to remove goods from one ship to another, if not to export them.

8 T. R. 269.  
Hadley v.  
Clarke.

6 Cranch 337.

ART. 5. *Carriers may have assumpsit for their hire &c.* They are bound to carry when they have conveniences, and are offered their hire, otherwise as to private persons.

5 T. R. 150.

§ 1. A barge master brought *assumpsit* for the carriage of divers goods for the deft. at his request. So a common carrier for carrying deft's. goods in his wagon, &c.

Bul. N. P. 70.  
—Imp. M. P.  
288, 289.

§ 2. It was moved in arrest of judgment, because only a reasonable reward was mentioned, as the carrier's hire; but the declaration was held good; for no certain sum might be agreed, and as in such case the carrier may maintain a *quantum meruit*, he is equally liable as when there is an express

2 Show. 81,  
Bastard v.  
Bastard.—  
1 Selw. 324.

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## Art. 6.

Dawes v. Peck, 8 T. R. 330.  
3 Bos. & Pul. 684, Dutton v. Solomonson.—3 Selw. 339.—3 P. W. 136.—2 Saund 47. Ch. 25, s. 12.—5 Burr. 2680. Davis v. James.—1 Johns. R. 214, 228, Sir Tho. Raym. 302.

agreement for a particular sum. The quantum meruit rests on all the circumstances of the case.

§ 3. The action against carriers must be brought by the owners of the goods. (See Consignments, Bul. N. P. 36.)

§ 4. Hence, if a tradesman orders goods to be sent by a carrier, a delivery to him is one to the tradesman, and the property, instantly thereon, vests in him; he alone can sue the carrier for any loss or damage to the goods; and this rule holds, as well where the particular carrier is not named by the purchaser, as where he is. And a delivery of goods by the vendor on behalf of the vendee to a carrier, although not named by the vendee, is a delivery to the vendee, unless the vendor especially agrees to transport them, then they are at his risk. Hence it seems to follow that the carrier must look for his hire to the vendee, where there is no special agreement the vendor shall pay him; but if the vendors or consignors agree to pay the carrier, they may sue him for not delivering the goods, and he them for not paying his hire; he has nothing to do with a change of property. 1 Vent. 119; Styles 296; 1 D. & E. 659.

3 Bos. & Pul. 582, declaration may be in *assumpsit* or case, &c.—5 Mod. 92, Dalston v. Janson, Boson v. Sanford. Hob. 18.—1 Inst. 115. B.—1 Show. 105.—8 Co. 52.—5 D. & E. 149.—1 Selw. 340, 341.—1 Ch. on Pl. 117.

ART. 6. *Manner of declaring &c.* § 1. Formerly in actions against carriers, the plt. stated their employment as common carriers; their liability by the custom of the realm; a delivery to, and acceptance by the defts. of the goods, to be carried for a reasonable hire or reward; concluding with the loss or damage to the goods. But the modern practice is to declare in *assumpsit*, and to omit the above particulars. But the declaration may, as above, be in *assumpsit* and join the money counts, or in *tort* and join *trover*. "The custom of the realm is the law of the realm, and consequently need not be set forth in the declaration;" of which custom the courts are bound to take notice, without pleading, as they are of any public law. There are two advantages in declaring in *tort*. 1st. The plt. thereby avoids the plea in abatement for not joining all liable; and 2d. he may have judgment, if some of the defts. be acquitted and some found guilty.

5 Burr. 2825, Ross v. Johnson.—Salk. 655.

§ 2. *Trover* lies not against a common carrier for merely *losing* goods entrusted to his care, without any actual wrong. The proper form of action is case. If the carrier, however, has the goods in his custody at the time when he refuses to deliver them, this will be evidence of a conversion.

6 East 564, Clarke v. Gray & al.

§ 3. *Assumpsit* may be maintained in the common form of declaring against a carrier, for the loss of goods above £5 value, and not paid for accordingly; though it were a part of the contract, proved by general notice fixed up in the carrier's office, and presumed to be known and assented to by the plt., that the carrier *would not be accountable for more*

than £5 for goods, unless entered as such, and paid for accordingly. This was an action against the proprietors of a stage coach, for goods sent with the plt's. wife in it, and lost. But if the plt. declare against the carrier generally, for his negligence, and he pays money as the £5 into court, he thereby admits the contract as laid; and hence the plt's. right to recover the full value of the goods, not restrained by such notice. However, 6 East 570, the court thought that paying money into court in *Yate v. Willan*, "did not admit a contract incompatible with the restrictive proviso, as to the amount of damages to be recovered in case of loss." Where such restrictive proviso goes to defeat any action, it ought to be stated in the declaration; where only to restrict the damages to £5, as the sum limited may be, then it need not be stated, but may be in evidence to limit the amount of damages.

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Art. 7.

1 H. Bl. 298,  
*Yate v. Willan*, and 6  
East, 369,  
370. Ch. 175.  
a. 6.

§ 4. *Carrier is bound to have his vessel tight and fit for the purpose.* Hence he is answerable for damages occasioned by leakage; and it is doubtful if he can exempt himself from this liability, by notice he will not be answerable therefor—the lighter was leaky.

5 East 428,  
*Lyon & al. v. Mills*.

ART. 7. *Cases in the United States.* See *Barrett v. Rogers*, Ch. 21, where the master of a vessel, a carrier, was not held responsible for the good order of the goods on a bill of lading.

§ 1. Held that masters and owners of vessels who carry goods for hire, are liable as common carriers, whether from port to port at home or abroad; liable by *marine and common law* for all goods lost, not arising from inevitable accident, or such accidents as could not be foreseen or prevented. And it is a question for the jury to decide, if the loss arose from inevitable necessity, not arising from human intervention, and not to be avoided by any human prudence. The defts. gave public notice they were carriers from the ports of this lake to Montreal &c. and of the vessels &c. The action was against the owners, and the master was the plt's. witness, who stated he contracted according to their orders. The loss happened near Montreal, out of the jurisdiction of New-York: hence, the defts. attempted to place the case on the marine law. "A common carrier warrants the safety and delivery of the goods, in all but the excepted cases of the act of God, and public enemies; and there is no distinction between a carrier by land, and a carrier by water;" and the marine and common law are essentially the same, so the civil law, and Hindoo law and law generally. It will be observed that this case was decided on English authorities. So was one against a carrier by land in 1820, in Massachusetts; so one in Georgia &c. on a voyage from Augusta to Charleston; so in Penn-

10 Johns. R  
1, 11, *Elliot v. Rosell & al.* Was on lake Ontario.

1 Bay's R. 99,  
*Bell v. Reed*.  
1 D. & E.  
33.

CH. 23. sylvania, 4 Bin. R. 127, on a voyage from Fort Erie, in Upper  
 Art. 8. Canada, to Pennsylvania, "was a conceded point the common  
 law doctrine applied to the case." Also 6 Johns. R. 170; 8  
 Johns. R. 248, proceeded on the ground the master of a ves-  
 sel is liable as a common carrier. There is, no doubt, in  
 these respects, the same law in every state in the Union, the  
 English law adopted here, except Louisiana; and that state  
 has the French law.

6 Johns. R.  
 166, 167,  
 Catts & al. v.  
 M'Mechen.

§ 2. See liability of ship owners as carriers in New-York,  
 Ch. 47, a. 5, s. 18, 19. Case against the deft. as a common  
 carrier of goods for hire, in a certain sloop, &c. Held, com-  
 mon carriers are liable for every injury which happens to  
 goods entrusted to them, except caused by the act of God, or  
 public enemies. So the sudden failure of the wind is the act  
 of God, and excuses the carrier, there being no negligence on  
 his part. Negligent or not, is a jury question. The action  
 was against the owner of the sloop, and the master was used  
 as a witness by the plts.

6 Johns. R.  
 170, 180.

§ 3. Assumpsit against the owner of the ship Science.  
 Held, master and owners are liable for goods embezzled, &c.  
 See this case—Master and Owners, Ch. 47, a. 5, s. 18.

8 Johns. R.  
 213, Watkin-  
 son v. Laugh-  
 ton.

§ 4. Assumpsit on a bill of lading against the master of a  
 ship, by the owner of the goods, shipped at Liverpool, for N.  
 York, for the part embezzled or lost on the voyage; admit-  
 ted to be without fraud on the deft's. part. Held, he was li-  
 able for the value of the goods missing, according to the clear  
 net value of goods of like kind and quality, at the port of de-  
 livery; but not for interest, if no fraud or misconduct be im-  
 putable to him. Held liable as a *common carrier*; see 3  
 Caines 219, cited as to the rule of damages not found settled  
 or discussed in the English books. This rule of damages was  
 received as the rule of the *marine law*. Freight deducted to  
 find the net value.

Lex Mer.  
 Am. 170.

ART. 8. *Several rules and cases.* § 1. According to Lord  
 Mansfield, the *act of God* means no more than a thing done  
 "in opposition to the act of man." But the *acts of God*, in  
 fact, are those *unavoidable accidents or events*, which human  
 prudence cannot prevent, as storms, &c.; and not those man's  
 prudence may prevent. Hence, if rats eat a hole in a ship,  
 and a loss happens, the carrier is liable; so if by a fire, if not  
 occasioned by lightning.

1 Wils. 281.  
 —1 D. & E.  
 27.

1 Stra. 145,  
 Tuckburne  
 v. White.—  
 Allen 93.—  
 4 Burr. 2301.  
 —1 Vent. 238.

§ 2. It was once held the carrier of goods was liable if rob-  
 bed &c., though deceived by the owners; but the rule is now  
 different. And though to a carrier who receives goods gene-  
 rally, and all kinds of articles, without any special qualification,  
 a person delivering goods, need not declare the contents or  
 value of the package he sends; yet if he be questioned

by the carrier, as he may properly be, and he gives a false account, he would, in case of a loss, recover no more than he specifies. In fact, where the value is stated, or a per centage allowed the carrier, his liability will not extend beyond the sum mentioned. If a passenger take more than the weight allowed, the carrier is not liable for a loss.

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§ 3. *The carrier cannot divide his contract unless by a settled usage.* He is bound to deliver at the residence of the consignee; and if a carrier put up at the inn or warehouse of another, who alone receives the compensation for sending out the goods transported; yet the carrier's responsibility ends not till the article be safely delivered to the person to whom it is destined; for it can be of but little importance to hold the carrier, while on the road, if immediately after his arrival he can exonerate himself of the responsibility, by delivering the packages to another, who may be totally unknown to the owner, and who may be not worth a cent. This too would be splitting a contract, entire for carrying from one place to another, without the owner's consent; as there would be one contract with the carrier, another with the innkeeper, and a third with the porter, &c. Not can the same men be *carriers and warehouse-men*: that is, A cannot be *carrier* of goods to his warehouse, and there, as *warehouse-man*, store them, and charge his storage, and *not be liable as carrier*. See these principles settled in Hyde's case, and *Golden v. Manning*, above. And Gould J. said, a carrier is bound to give notice to him to whom the goods are to be delivered, whether bound to deliver or not. But the master of a ship is only bound to carry from "*port to port*," by his bill of lading.

5 D. & E. 306.

§ 4. *Owners of vessels may be liable for the act of their master, though they post notice to the contrary.* As where the defts. and others, in Sept. 1798, posted in several places in Hull, printed hand-bills, giving notice that in future the owners of vessels would not be answerable for any loss or damage, happening to any cargo, *unless occasioned by the want of ordinary care and diligence in the master and crew*; in which case they would pay 10 per cent. upon the loss or damage, provided such payment did not exceed the value of the vessel; but that they were willing to insure against all accidents on receiving *extra freight* in proportion to the value &c. The defts. owned a vessel trading from Hull to Gainsborough, and the plt. put some goods on board her, *ignorant of said notice*, to be carried to and delivered at Stockwith, a place between Hull and Gainsborough, *as the vessel went to Gainsborough*. For the carriage here was no special agreement. She went safe to Stockwith and there delivered part of her cargo, but not the plt's. goods; being covered up by goods to

8 D. & E. 531,  
*Ellis v. Turner & al.*

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Art. 9.



be delivered at Gainsborough. The master went on, and she was sunk between Stockwith and Gainsborough, *without any want of ordinary care or diligence, in the master or crew.* It was sometimes the practice to carry goods to be left at Stockwith, to Gainsborough, and to leave them at Stockwith in coming back from Gainsborough to Hull. An action on the case was brought against the owners: they deducted what the damaged goods sold for, and brought into court 10 per cent. on the residue of the plt's goods; but judgment for him for his whole loss, on the ground *respondeat superior*. The defts. were deemed answerable for this misconduct of their servant, who might, and ought to have left the plt's. goods at Stockwith, as he went from Hull to Gainsborough; as these were matters that respected his duty under them. The court disregarded the hand-bills the defts. and other owners of vessels had posted. The master so engaged to deliver the plt's. goods at Stockwith, as he went to Gainsborough, without the privity or knowledge of the defts.; but it was in the nature of his business so to engage. The agents of the plt. who shipped the goods had before had the said hand-bills delivered to them.

§ 5. *When the carrier has carried the goods his whole distance, his responsibility is at an end, and after that he may, as to them, act as a warehouse-man.* Hence, a loss of the goods by fire, or other accident, while in the *warehouse*, waiting for an opportunity to be sent to their ulterior destination, will fall on the owner; for warehouse-men are not insurers, as carriers are. 4 D. & E. 581, Garside's case.

Amies v. Stephens, Stra. 128.

§ 6. It is, also, a rule, that it is sufficient if the carriage, or vessel, or boat, &c. of the carrier, be adequate to perform the journey, or voyage, without any extraordinary accident; Amies v. Stephens, above. The accident in this case was a sudden and unexpected gust of wind, in passing a bridge. But the carrier is liable, if he run into perils common prudence and foresight may avoid.

1 East 604, Edwards & al. v. Sherratt.

ART. 9. *The common carrier is not liable, unless contracted with, as a common carrier.* § 1. In this case a new principle seems to have been started; hence, no authority was cited. This was an action on the case, in common form, against the deft. as a *common carrier by water*, from Wolverhampton to Birmingham; for negligently carrying a quantity of wheat, of the plt's., whereby it was lost; also, money counts. General issue pleaded. This wheat was in a warehouse of Beckley & Co. at Wolverhampton for the plt's. use, who lived at Birmingham; the deft. was a *common carrier* between Birmingham and Wolverhampton, and so on to Radford, lying beyond Wolverhampton; but the carriage of goods between Radford and Wolverhampton, and Wolverhampton and Birmingham, was

conducted by *different boats*. In the scarcity of bread &c. in 1800, a riotous disposition appeared at Wolverhampton; the mob pulled down one corn mill, and it was reported they intended to attempt the warehouse of Beckley & Co.; thereon their acting clerk wrote to the deft. to send an *extra* boat for this wheat as *quickly and as privately* as he could, on account of the state of the country; he received no answer, but on Monday, Sept. 29, 1800, finding a boat of the deft's. which had been to Radford, or somewhere beyond Wolverhampton, and then returning empty by Wolverhampton to Birmingham, he caused it to be stopped for the purpose of taking a quantity of wheat on board; and Green, the boatman, making no objection to the proposal, 166 bags of wheat were put on board for the plts., and some flour for a Mr. Allen; the bags were put on board *in open day*, and the wharfinger's clerk gave no particular directions to the boatman, but he had sent *privately* to the lockmen, to have the lock ready to let the boat pass free *at any time* the boatman chose to go off. She went off in the evening of said Monday; the usual days for the deft's. boats to go off from Wolverhampton to Birmingham were Tuesdays and Fridays; and this was not one of those boats, but one used from Radford to Wolverhampton. There was another load at the same time, from the same wharf, that went in company. Some part of Allen's flour arrived safe, for which the deft. charged a freight; but 166 bags, that belonged to the plts. were seized by the rioters, 4 miles from Wolverhampton, and lost to the plts, and no charge of freight was made. *The plts. never informed the deft. or his boatmen of the danger.* But the deft. claimed demurrage for the time the boat was detained by the rioters; but this the plts. refused to pay. The question made, and for the jury to decide, was "*whether the bags were put on board, according to the usual course of dealing, with a common carrier.*" The jury found the bags were not put on board in the usual course of dealing with a *common carrier*, and so their verdict for the deft.; and the court held, the verdict was right, either on the general ground of *fraud* in the plts., or on the circumstances of the case, proving the deft. engaged to do the best he could, but not to be answerable as a *common carrier*; for the violence of the mob; or because it did not appear that the boatman, whose ordinary employment was between Radford and Birmingham, had authority from the deft. to accept the goods at Wolverhampton, for Birmingham, much less to accept them in that manner. The court thought it was properly left to the jury, to decide if the bags were put on board *according to the common course of dealing, with a common carrier*; and if not, then to find for the deft.; and that this was correct; and that

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CH. 24. it was a proper question of *fact* for them to decide. *Ld.*  
*Art. 1.* Kenyon C. J. said, "there is fraud apparent on the face of  
 the transaction."

Lawrence J. held the boatman, Green, did not act under the proper authority of the defts.; that is, as *Le Blanc J.* explained it, the boatman, Green, had no power from the defts. to take goods from Wolverhampton to Birmingham, and that this business the defts. assigned to another servant.

3 Inst. Ch.  
418.

In this book is a regular plea by a carrier, that he was robbed of the goods entrusted to him to carry, and in his plea he states particularly how he was robbed, &c.

2 Maule &  
Sel. R. 1, 5.

§ 2. Assumpsit against the defts., as a carrier by water, from Bristol to Worcester, for not safely carrying sugar, &c. He had given notice he would not be liable for loss or damage, unless by the actual negligence of the master or mariners. Held, he had not waived his notice, by paying previous losses to the plts. for damage, without enquiring into the cause of such damage.

## CHAPTER XXIV.

### ACTION OF ASSUMPSIT. CHOSE IN ACTION.

2 Bl. Com.  
396, 397.—  
Saik. 654,  
Arnold's case.  
—2 Cruise 6.  
—4 Cruise  
162, 172.

ART. 1. A *chose in action*, is rather a thing *in potentia*, than *in esse*. All property in action depends entirely upon *contracts*, either expressed or implied; which are the only regular means of acquiring a *chose in action*; on the non-performance of all which, the law gives an *action of some sort* to the injured party, who regularly has no possession, till it is acquired by judgment and execution. But he has property in the evidence of the debt, as the bond &c.; and may maintain *trover* to recover it. Choses in action are debts due from nations as well as individuals.

2 Bl. Com.  
442.—  
1 T. R. 26,  
Delancey v.  
Stoddart.

ART. 2. *How a chose in action, substantially, belongs to the assignee*, though he must sue in the name of the assignor. Debts to the crown, however, were always assignable. In this case a policy was assigned over, and it was held it was recovered to the use of the assignees, in the case of a loss. Bond assigned; see *Legh v. Legh*, Ch. 167, a. 4.



§ 2. In this case many authorities are cited by Justice Buller to shew that a *chose in action* is now in substance assignable, though not in form. It has long been held that the assignment of a bond is a good consideration of a promise. But a right of entry is in no sense assignable.

§ 3. In this case it was decided that the assignment of a *chose in action* need not be by deed: nor is it necessary in pleading, to set forth the manner of the assignment.

§ 4. In this it was decided that a policy of insurance is assignable, so far as to vest an equitable interest in the assignee, by the assured's assignment, though the underwriter do not assent, or know of the assignment; and after this assignment he is not trustee to the assured, but owes the loss to the assignee, and not to the assured.

§ 5. In legal strictness, a *chose in action* cannot be assigned; "still according to the rules of equity and honest dealing, if the assignee give notice to the debtor of such assignments, he shall not afterwards be suffered to avail himself of a payment to the principal in fraud of such notice."

§ 6. It has been determined, that in equity, a husband may assign a *chose in action*, which he has in the right of his wife, and which, also, he may recover or discharge.

§ 7. If the obligor, after notice of the assignment, pay the money to the obligee, he will be compelled to pay it over again, though payment without notice is good. *Legh v. Legh*.

§ 8. The assignor, who has become a *bankrupt*, may sue the debtor for the benefit of the assignee; for by the assignment, the property is his in equity. Nor does a debt due to a bankrupt, as a trustee for another, pass under the assignment of his effects, after the assignor has assigned the *chose in action*, as a balance of accounts &c. He is merely trustee of the debt, for the assignee. And the courts of law will now take notice of a trustee, though they did not formerly.

§ 9. So the debtor may *offset* with the assignee, as where the debt. pleaded that he owed the bond to the plt., who held it in trust for one A, and that she owed the debt. more than the amount of the bond. On demurrer to this plea it was adjudged good. So after an assignment, the obligee holds the bond in trust for the assignee.

§ 10. In this case, one Read obtained a judgment and execution against Murry, and assigned them over to Cobb, with a power of attorney annexed, to receive the amounts to his, Cobb's use. He sent this execution to Hudson, a deputy sheriff, to collect of Murry, and to pay the same to Cobb. To this, Hudson assented. Hudson received the debt of Murry, and before Hudson had paid it over to Cobb, Hudson was attached as trustee to Read, the judgment creditor. But the

CH. 24.  
Art. 2.

4 T. R. 339,  
Masters v.  
Miller.  
4 T. R. 690,  
Howill & al.  
v. MacIvers  
& al.

Mass. S. Jud.  
Court, 1801,  
Wakafield v.  
Martin.

6 T. R. 362,  
in Read v.  
Dupper.

2 Woods'  
Con. 158

4 T. R. 125.  
—Imp. M. P.  
54.

1 T. R. 619.  
Winch v.  
Keeley.

Bottimly v.  
Brooks, cited  
1 T. R. 621.  
Same Rudge  
v. Birch.

Mass. S. Jud.  
Court, June,  
1795, Hud-  
son's case.

CH. 24. court held that Hudson was not *trustee to Read*, because in justice and equity, the debt was Cobb's property, by virtue of the assignment. This decision was in a court of law.

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3 M. R. 558,  
Wakefield v.  
Martin.

§ 11. In this case the court decided that the assignment of a policy of insurance vests an equitable interest in the assignee, *without* notice to the underwriter. Before notice to him, this interest is in the assignee, and notice to the insurer is, that he may have no excuse for paying the assured.

3 Salk. 120.

§ 12. Where a *chose in action* is created by deed, as a bond &c. the destruction of the deed is the destruction of the duty itself.

9 M. R. 337.

§ 13. See when the assignment of a chose in action is not defeated by the death of the assignor, and several points as to the assignments of a chose; *Dawes, Judge, v. Boylston*, Ch. 14, a. 3, Assignments.

Vatt. lib. 3,  
ch. 5 s. 77.—  
3 Bos. & P.  
191.—*Beawes*  
38.—1 Rob.  
R. 200, case  
of the Hoop.  
—1 Rob. R.  
196.—13 Ves.  
jr. 71.

§ 14. *Debts due from foreign nations*, are not in modern practice, usually confiscated, but payment is suspended during a war between the debtor nation and the creditor's. But Vattel thinks the debtor nation, in such case, has a right to confiscate, and so the debts its subjects owe to their enemies, at least forbid payment during the war. England and the United States adopt the latter course. Such creditors cannot sue during the war; and on the ground, above stated, no alien enemy can sue. And in case of the debtor's bankruptcy, it may be proved, though not paid during the war. But this doctrine of suspension only, does not apply to a contract made with an enemy during a war; for such contract is void, except in some very special cases. According to a case in *Parker's R. 207*, the old law was confiscation, even of debts contracted in a time of peace: but this doctrine has been discontinued in modern times. 3 Bos. & P. 191, 200, *Furtado v. Rogers*: but such debts are more properly considered as a part of a political system.

§ 15. *Bond, assigned in New-Jersey*. The assignee of a bond cannot sue the assignor on failure of the obligor to pay it. *Pennington 20, Garretts & al. v. Van Ness*, id. 211. So in the case of a sealed bill. *Penning. 158, Harris, admr. v. Clark*.

§ 16. By the statute in New-Jersey, enabling the assignee of a bond to sue in his own name, bonds are put on the same footing with personal property in possession; and the buying and selling them must be governed by the same law. *Penning. 158*. In equity on the sale of a chose in action, or of a right in equity, it is a good rule to give notice to the debtor and trustee: this binds him. *Tourville v. Naish*, 3 P. W. 307; *Davies v. Bustin*, 1 Vesey jr. 247, 249; 2 P. W. 495; 15 Ves. jr. 354; 2 Taun. 413. Such notice may give a

preference to a second, over a first endorsee, who does not give it. *Stanhope v. Verney*, Co. Lit. 290; and 9 Vesey jr. 410. If B buy a chose in action or equitable title of A, B must abide by A's case, and will be entitled to his remedies. *Whitfield v. Fausset*, 1 Vesey 387; *Turton v. Benson*, 2 Vern. 764; 7 Vesey jr. 245; *Priddy v. Rose*, 2 Mer. 86; 1 Dallas 28; 1 Yeates 23; *Murray v. Sylburn*, 2 Johns. Ch. R. 443; *Norton v. Rose*, 2 Wash. 233; *Porter v. Blackenridge*, Hardin 24; 17 Vesey jr. 485; 3 Atk. 238. But if a chose in action or a right &c. be subject to any lien &c., and the purchaser or assignee *knows it*, equity will not aid him though he pay a full consideration. *Murray v. Finch*, 2 Johns. Ch. R. 157. He is in the shoes of the seller, *Jackson's case*, Lane 60; *Taylor v. Stibberts*, 2 Vesey jr. 437; 1 Yeates 291; 2 Bin. 455; 2 Munford, 527.

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ART. 3. *Further cases in the United States.* The law will protect the equitable interest of the assignee of a chose in action; but the assignment must be for an adequate consideration, and so appear by the pleadings. And a quære is added if such assignment must not be by deed, even though the thing assigned is evidenced by writing only. It is difficult to discern whence this doubt arose.

1 Mass. R.  
117, Perkins  
v. Parker.

§ 1. Also see *Ridden, admr. v. Shute*, admr., the case of a debt in the probate office sold, Ch. 2, a. 8.

§ 2. *A seaman's future wages assignable by parol &c.* *Isaac Head*, a seaman in the ship *Favourite*, bound on a voyage to India and back, owed the plt's. wife, while sole, \$188,85, on a promissory note. The deft. *Whitney*, was supercargo on the same voyage, and at *Head's* request, by a memorandum on the note, signed by the deft., promised her to pay said sum, "if *Head* should have so much on board said ship on his return to *Nantucket*;" which meant, as the plt. averred, if there should be so much due to the said *Head* from said ship. She returned, and the plt. averred there was as much due &c. Verdict for the plt.—judgment on the verdict. The principle settled in this case was this: that *Head*, for a valuable consideration, and existing debt to *Mrs. Crocker*, assigned to her, and this he might by parol, his wages due, and to be due to him in the voyage, and the deft. having notice of this, there was imposed "on him an equitable and moral obligation to pay the money" to her, the assignee, and this was a good consideration for the deft's. said express promise. No objection the assignment was of an *unliquidated* balance of account. If the deft. promised to pay what should be found to be due from him, he became liable for the amount when ascertained. Nor any objection it was of monies to become due in future. The form of the deft's. promise and the verdict, were relied on

10 Mass. R.  
316, Crocker  
& ux. v.  
*Whitney*.

CH. 24. as proving the debt. was indebted to Head for his wages &c.  
 Art. 3. though this fact of his being so indebted was not alleged in the  
 ~~~~~ pl't's. declaration. The court held the debt's. promise was  
 merely limited, as to its extent, and not a condition precedent
 to the performance of it. "It is not a promise to pay the
 pl't's. debt, on condition only of his having enough in his hands
 to pay the whole : but a promise to pay to the extent of what
 he may have in his hands." There arises on this case but
 one doubt, if any ; and that is, how the court could presume
 the jury found a very material fact to be true, to wit : *the debt's.*
being indebted to Head, when this fact was not alleged in the
 pl't's. declaration. That only averred so much due to Head
 from *the ship*. The general rule being, the proof must be ac-
 cording to the allegations, and the verdict according to the
 proof.

1 Cranch 423. § 3. *Cases in the federal courts.* The meaning of the rules
 a *chose in action* is not assignable.

2 Cranch
 342, Win- A had an open account with B, and assigned it to C, with
 chester v. B's assent. A may still sue the account in his name against
 Hackley. B for C's use ; but B may off-set his claims against C. Ch.
 168, a. 6, s. 8.

6 Cranch 82, § 4. A bond sued, breaches assigned, and a jury to assess
 Lewis v. damages, is not assignable as a *chose in action*, on the statute
 Harwood. of Virginia : the debt is too uncertain. Only a money debt is
 assignable by the act of 1748.

6 Cranch 204, § 5. In Virginia, the assignee of a negotiable note sued the
 Stewart v. maker. Held, he might set-off such note as he held against
 Anderson, in the assignor at the time he had notice of the assignment of
 error. such chose in action ; though the note to said maker, was not
 due at the time of the notice, but became due before the note
 sued. The act of Virginia provides that assignments of bonds,
 bills, and promissory notes, and other writings obligatory for
 payment of money or tobacco, shall be valid ; and an assignee
 of any such, may thereon maintain an action of debt in his
 own name, but shall allow all just discounts, not only against
 himself, but against the assignor before notice of the assign-
 ment was given to the debt.

Toller's L. of *Choses in action*, how *assets* &c. in the hands of executors
 Ex. 157 &c. and admrs. : generally, not till recovered. They are entitled
 —Off. Ex. 66. to all the debts of the deceased, accrued in his life time ; as
 —3 Bac. Abr. judgments, recognizances, debts due on special contracts, as
 69. for rent ; or on bonds, covenants, &c. under seal ; or on sim-
 ple contracts, as notes and promises, expressed or implied.
 So to damages for trespasses on the deceased's goods in his life
 time, by 4 Ed. 3, c. 7. So for converting them, or for a
 trespass with cattle in his close, or for cutting his growing corn,
 a chattel, and carrying it away at the same time ; and so to

1 Vent. 187.
 —Poph. 189.
 —3 Bac. Abr.
 69.

damages for every other injury done to the personal estate of the deceased in his life time ; so for a breach of a covenant as to personal things, though it sound in the realty, as for not assuring lands, if broken in the *testator's lifetime*. Com. D. admr. B. 13, and covenant, B. 1. And the damages in all these cases, when recovered, are *assets*. So if a bail bond be assigned to A, his executor recovers on it as a vested interest. Com. D. admr. B. 13. So if damages accrue to the testator by an escape, or false return, or detainer of money by an officer, his executor recovers them as *assets*. 1 Salk. 12. So on writs of error or *audita querela*, the damages come to his executor or admr. as *assets*. 3 Bac. Abr. 60. So he is entitled to replevin of the deceased's goods. 1 Sid. 82. In all these cases, the action accrues to the deceased in his lifetime, and the case is the same where it accrues after his death, on a right in him ; as if A covenant to lease land to B on a certain day, and he dies before the day, and lease made ; A must make it to B's executor, and it vests in him *as executor*, and is *assets*, or if A refuse, his covenant is a chose in action, B's executor can enforce : the damages he recovers are *assets*. Plowd. 286. A deceased plt's. bail bond assigned to his executor is *assets*, as much as if assigned to the deceased. Fortes. 370. So if his debtor in execution escape after the plt's. death. Com. D. admr. B. 13.

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Com. D.
admr. B. 13.
—Cro. El.
297
Com. D.
admr. B. 13.
—Stra. 212.

ART. 4. *Choses in action, if assignable in their nature.*

§ 1. The general question is what *choses in action*, or contracts are, *in their nature*, or on the special terms of them, so assignable, negotiable, or endorsible, as to enable the assignee or endorsee, to sue them in *his own name*. But the more immediate question is, whether a *money note* made payable to one, or *to his order*, is so assignable or endorsible, independent of any statute. It is very important, in every state in the Union, to know what is *negotiable* paper in each state ; because such paper, or contracts, made in each state, very often circulate, and are suable in every state ; and there is no subject on which our law is more unsettled ; because what contracts are so assignable in their nature, or on general principles, independent of any statute, is yet uncertain ; because many of the states have adopted the said statutes of W. 3, and Anne, cited Ch. 20, a. 3, and several have not ; and because several states have statutes on this subject, varying more or less from those English statutes, as Virginia &c. Also, in some states, bills, notes, orders, and other contracts, usually made negotiable, as above, are left to rest wholly on the principles of the common law, including the law merchant.

§ 2. The general principle clearly is, that a *chose in action*, or a right in one to sue another, to recover money or property

CH. 24. in a court of justice, is not assignable, so as to enable the assignee to sue in *his own name*. The policy of the law forbids such assignments, in order to prevent lawsuits being brought up and multiplied, by men more litigious or better able to carry them on, than those having the original right to sue. But there are three kinds of exceptions to this general rule. 1st. In chancery, or equity courts, and when the king has been a party, as courts of this kind have been viewed as having such a controul over the motives and conduct of the parties, by examining them on oath &c., as to be able to prevent abuses in thus transferring a right to bring suits; and kings in general, suing for the public, as being not likely to practise abuses in such cases. 2d. kind of exceptions are those made by statutes enacted by our legislatures, now so numerous. These statutes are many and variant in their principles and provisions. There have been but few judicial constructions upon them. It is, therefore, at present, in vain to attempt to show how far these statutes make contracts, or *choses in action*, assignable or not. The 3d kind of exceptions are such as *the reason* of the law has introduced, to promote and facilitate commerce and money operations; the benefits of which have been considered greater than the evils to be feared in *assigning* or *transferring* in such cases, the *right* to bring actions. A *foreign bill of exchange*, or as once called, *outland*, payable to order, has ever been an exception to the general rule, and within this 3d exception. On the other hand, every contract not payable to order, or bearer, has ever been subject to this general rule; not by statute exempted from it. The said English statutes, and some of our state statutes, make *inland bills* and *money notes*, payable to order, assignable as *foreign bills* are. How far such *inland bills* and *money notes* were so assignable as to enable the *assignee* or *endorsee* to sue in *his own name*, before said statutes were passed, is the question now to be considered; and a very material question it is; for if before, so assignable, they generally remain so, notwithstanding most of our state statutes on the subject. To form correct ideas on this subject, we must resort to the decisions made before said English acts were passed, especially that of Anne.

§ 3. A *chose in action*, or contract to pay monies to one, or to his order, before the 9 & 10 W. 3, c. 17. When a contract was so made, it was evident the parties meant it should be negotiable, so as to enable the *assignee to sue in his own name*. But this intention could not support his action, further than the law sustained it. And it clearly was a question, if the law did sustain such an action on a note &c. Cases. Six

English statutes—Winch. 24, Vanbeath v. Turner, 2

Inst. 404.—2 Keb. 155.

hundred years ago, "the *old and rightful custom*" of merchants was recognized in *Magna charta*, ch. 30, and often in subsequent statutes; and so was the *law merchant*. Two centuries ago, Hobart C. J. said, "the *custom of merchants* is part of the common law, of which judges ought to take notice;" and ever since, this has been the settled opinion. Still we find no decisions, shewing to what contracts and actions this custom extended; but early in the reign of Charles II. it was held, the law of merchants was the law of the land, and was good for any one *without naming himself merchant*.

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§ 4. It was for a long time deemed necessary to shew or plead this custom, but A. D. 1691, it was held not necessary; as in this case an action was brought by an endorsee, against the drawer of a bill of exchange. The plt. stated, the deft. drew it according to the custom of merchants, on W., merchant at Rotterdam, payable to H., and alleged the custom; that H. assigned the bill to the plt.; that he tendered it to W.; and that he did not pay it—was protested &c. Judgment for the plt.; and held, 1st. "the law of merchants is *jus gentium*, and is part of the common law;" and ergo, "it is not necessary to shew custom of merchants." A D. 1693, there was a like decision, and held, also, setting forth such custom specially in the declaration is but *surplusage*. Also, a bill of exchange, payable to A or *bearer*, is not assignable; but one payable to *order* is, by the authority given in it. This was said in regard to an *inland* bill, drawn by the deft. on himself; and it is observable the court said this bill was assignable by reason of the authority *given in it*. 2d. Held, this was a good bill between the endorser and the endorsee, "for the endorsement is in the nature of a new bill." 3d. One's drawing a bill makes him a merchant *quoad hoc*.

12 Mod. 15,
16. Maggadore v. Holt & al.—1 Show. 318, Butter v. Play.—1 Mod. 27.

Carth. 260.—12 Mod. 37, Hodges v. Steward.—Salk. 115.—Hard. 496, and Sarsfield v. Witherley.

A. D. 1696, Treby C. J. said, "that bills of exchange at first were extended only to merchant strangers, and afterwards to inland bills between merchants trading one with another here in England; and after that to all traders and dealers, and of late to all persons trading or not, and there was no occasion to allege any custom," and this was not denied by any of the other justices. This was before the 9 & 10 W. III. And even Lord Holt, A. D. 1702, said, "all the difference between foreign and inland bills is, that foreign bills must be protested before a public notary before the drawer may be charged, but inland bills need no protest." Many other cases shew, that inland bills were assignable independent of any statutes, so as to enable the assignee to sue in his own name, though there no doubt was a time when the law merchant was viewed "as confined to cases where one of the parties was a merchant stranger." Probably as late as 1640 or 1650.

1 Ld. Raym. 180.—2 Lutch. 1586, Brunswick v. Lloyd.—6 Mod. 29, 30.

3 Wooddeson 109, Maynes. Marius.

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6 Mod. 29,
31, Buller v.
Crips, and
many author-
ities cited.

§ 5. But if A made his money note, therein promising to pay £10 to B or to his order, and B endorsed it to C, could C in his own name sue A as maker, or B as endorser, independent of any statute? This was the litigated question which produced the said 3 & 4 of Anne. In this case, Buller v. Crips, the note was in this form, "*I promise to pay J. S. or order the sum of £100 on account of wine had of him.*" J. S. endorsed this note to another, the plt., he brought the action against the maker, and declared on the custom of merchants as upon a bill of exchange. Motion in arrest of judgment. Lord Holt said, such notes were "only an invention of the goldsmiths of Lombard street, who had a mind to make a law to bind all that did deal with them." The opinion of the court appeared to be for arresting the judgment, and that the endorsee might have sued in the endorser's name; and that these notes are not in the nature of bills of exchange.

Com. Dig.
Merchant.
F. 1, F. 2,
cites Ma. 71
to 75.

Comyns speaks of a bill of debt without seal, that bound the merchant to pay money at such a day. And such a bill binding without seal was by the custom of merchants, and so without witness or delivery might be made payable to bearer and on demand; so it might be made and subscribed by the merchant's servant. So a bill of debt to a person certain, might be assigned to another *toties quoties*. He then refers to the 3 & 4 of Anne. Some think this bill of debt described by Malynes, p. 75, and noticed by Comyns, was a money note so assignable as to enable the endorsee to sue in his own name. But this is very questionable, and for two reasons among others. 1. Malynes describes a material feature in this bill of debt, never it is conceived a part of the English or our money note; for Malynes says, if a bill of debt be signed by two or more as principals, each is bound by the custom of merchants only for his part. 2. He made his bill of debt rest on the custom of merchants.

§ 6. The modern doctrine is, "that before the statute of Anne, promissory notes were not assignable, or endorsible over within the custom of merchants, so as to enable the endorsee to bring an action in his own name against the maker." Though this doctrine is general, it is not universal. There are decisions both ways.

Salk. 129,
Clerk v. Mar-
tin. 1 Anne.
Same case 2
Ld. Raym.
767.

§ 7. *Decisions in support of this doctrine.* The debt gave to the plt. a note by which he promised to pay to him so much money or to his order. The plt. sued the note and declared on the custom of merchants, also laid a general *indebitatus assumpsit*. On the general issue entire damages were given; and on a motion in arrest of judgment, held by the court (B. R.) "that this is not within the custom of merchants, and being no specialty, no action can be grounded on it." And the

marginal note is, "action lay not on a promissory note before the statute." In this case, as the action was brought by the promisee, the question as to negotiability could not arise. But as held, the promisee could not sue on the custom of merchants; quære, if an endorsee could. In this case, as cited in Lord Raymond, Holt is made to say, that in *Horton v. Coggs* it had been held, that such a note was not a bill of exchange within the custom of merchants, and that this promise was "not sufficient in law to raise a promise."

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§ 8. Error of a judgment in the Common Pleas, on a like note. The plt. declared there was a custom in London among merchants trading there, that if a merchant signed a note, promising to pay to J. S. or order &c., he became bound by the custom of merchants to pay &c. Judgment reversed, which had been given for the plt. And Holt C. J. said, "this custom to oblige one to pay by note without consideration is void and against law." Same case 2 Ld. Raym. 759.

Salk. 129,
Potter v.
Pearson.
1 Anne.

§ 9. In this case on a motion in arrest of judgment the decision was, as in *Clerk v. Martin*, that such a note is not within the said custom; but that the declaration ought to be on a *mutuatus*, and the note given in evidence; for the rule is *ex nudo* &c., as in *Potter v. Pearson*, and the whole court recognised *Clerk v. Martin* as law.

Burton v.
Souter, 2 Ld.
Raym. 774.—
1 Anne.

§ 10. This was error from the C. B., two counts: 1. On the said custom on a note given by the deft. to the plt. and promising to pay him so much money: 2. *Indebitatus assumpsit*. Several damages assessed. But only one judgment assigned for error, that the count on the custom, was void, and the judgment was reversed *in toto*. And Holt C. J. said, "all the judges were of opinion, that a declaration on the custom of merchants on a note subscribed by the deft. to the plt. for so much money, or promising so much money was void; for it tended to make a note amount to a specialty." And *Buller v. Crips*, above, was decided 2 Anne. In this case, and in this only of all these cases, did the endorsee bring the action. And Holt C. J. added, (in *Buller v. Crips*) and sure to allow such note to carry any lien with it were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty, and besides to empower one to assign that to another which he could not have himself; for since he to whom this note was made could not have this action, how can his assignee have it? And he said further, that these notes are not in the nature of a bill of exchange, and that if "endorsee had brought this action against the endorser it might peradventure lie, for the endorsement may be said to be tantamount to drawing a new bill for so much money as the note is for, upon the person that gave the note, or he may sue the first drawer in the name of

Williams v.
Cutting,
Farr. 164,
155.—Same
case 2 Ld.
Raym. 825.

Buller v.
Crips.

CH. 24. the endorser to the endorsee's use ; but it is observable this
 Art. 4. action by the endorser, that is, payee, against the drawer of
 the note, is precisely that of Clerk v. Martin &c.

3 & 4 of
 Anne.

§ 11. Soon after the decisions in these cases, and some others less important, and many dictums and arguments on this subject, the English parliament enacted the 3 & 4 of Anne, before cited, chapter 20, art. 3 ; this statute recited, that it has been held that money notes are not negotiable, so as that the assignee may sue in his own name, and then provided for their being negotiable when payable to order or bearer &c. This statute has a very important bearing on this subject, though not absolutely considered such notes as not negotiable so as &c. It is fairly to be supposed, that if parliament understood that those decisions were wrong, above stated, it would have left them to be corrected by after decisions, and that it would not have interfered. But from the recitals in, and the enactments of that statute, it is fairly to be inferred, that parliament thought negotiable money notes were very useful in the then increasing extension of trade, and that by the strict rules of law they were not negotiable ; at any rate it was doubtful if they were, and therefore it enacted a statute expressly making them negotiable as bills were. Also it will be observed, that act considered these notes not negotiable in their nature, as well as not within the custom of merchants, and so they have been generally considered since in their nature unaided by any statute, and on this ground was *Mandeville v. Riddle* decided. Ch. 20, a, 10, s. 16. For if the note in that case had been negotiable in its nature, and in virtue of the authority given in it, there was nothing in the statute of Virginia to take away this its negotiability. And if so, then an endorsee might have recovered against a remote endorser on a proper count, but the contrary in that case was held by the Supreme Court of the United States. And, therefore, indirectly disapproved of the decision made in favour of such negotiability of money notes in their nature in *Dunlop v. Silver & al.* by two of the judges in the Circuit Court in the district of Columbia, against the opinion of Judge Marshall, about a year before the decision in *Mandeville v. Riddle*. It is true in *Mandeville v. Riddle*, there was only *indebitatus assumpsit* for money had &c. which lies only between *prioris*, the endorsee, and his immediate endorser. But if understood, the note was in its nature negotiable as a bill is, no doubt another count would have been added.

Dunlop v.
Silver & al.,
 1 Cranch 387,
 to 461.

Malynes 71
 to 76.

§ 12. *Malynes* in his *lex Mercatoria*, published A. D. 1686, speaking of bills of debt among merchants, traders, and others, says expressly, that "the common law of England is directly against this course ; for they say there can be no alienation

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from one man to another of debts ; because they are held *choses in action*, and such whereof no property can pass by assignment or alienation, and many good lawyers, as well as merchants, do wish that there were an act of parliament made for establishing a like course in England ;” that was, to make bills of debt negotiable there, as they were in Amsterdam, Middleborough, Hamburg, &c. Malynes then wrote two chapters to shew the manner of bills beyond the seas, the setting over of bills of debt, (and his given form of one contained value received in merchandise &c.) as to selling these bills obligatory, as he calls them, (though he annexes no seal or witness to his prescribed form,) and the general benefits in assigning them being made payable to bearer. And further, Malynes proposed to establish in England the usage of these bills of debt, and so implying clearly, that about nineteen years before the said 3 & 4 Anne they were not much used in England ; he says, also, in the Eastern countries, and sometimes in the Low countries, they put seals to them, and then a delivery was understood of course, and also that it was necessary to express in them what they received, whether merchandise, money, or what kind of consideration. Pretty clearly such a contract was new as a legal one in English practice in the courts of law. So no ground for supposing as some do, that this bill of debt mentioned in English books, was the same as the English and our money notes. As the law merchant had its rise in the civil law and in foreign ordinances, which were long received with much reluctance in England, this law merchant gained ground there slowly in all respects, except in regard to foreign or outland bills of exchange, and matters in which foreign merchants were concerned ; hence, slowly in regard to inland bills, and very slowly if at all in regard to promissory notes. And since the 3 & 4 of Anne this law merchant has not been required to aid them ; as that statute, as Lord Mansfield observed in *Grant v. Vaughan*, 3 Burr. 1516 &c., put notes payable to order or bearer, merely upon the footing of inland bills of exchange. Even in this case A. D. 1764, a plain inland bill is repeatedly called a note, also a cash note : the same footing per *Wilmot J.*

§ 13. *Decisions against this doctrine, and tending to prove promissory notes were held to be within the custom of merchants as inland bills of exchange were.* 1 Cranch 415 it is said, we find before the statute of Anne, “ that it never was adjudged that a promissory note for money payable to order, and endorsed, was not an inland bill of exchange.” “ But we find that the contrary principle has been recognised in all the cases from the time of the first introduction of inland bills and pro-

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Carth. 269,
Williams v.
Williams.—
A. D. 1692.

missory notes, to the first year of queen Anne ; and that in one of them it had been expressly adjudged on demurrer in the king's bench, and judgment affirmed upon argument in the exchequer chamber before all the judges of the common pleas and barons of the exchequer."

§ 14. Cases to this purpose. In this case John Pullen made his note, and thereby promised to pay £12 10s. to Jos. Williams, on a day certain; he endorsed it to Daniel Foe, and he endorsed it to the plt., Thomas Williams, a goldsmith in Lombard street, for like value received. The plt. as the last endorsee, sued the last endorser, and declared, "that the city of London is an ancient city," and on a custom in it, time out of mind, among merchants and other persons residing and exercising commerce within the realm of England, used and approved &c. stating a custom that included said note and endorsements &c., then stated the making, and endorsements of it made by said Pullen, a merchant, according to the custom of merchants, and said endorsements according to it. Notice to the drawer and his refusal to pay, whereby the deft. according to the usage and custom of merchants became liable to pay the plt., and in consideration thereof promised to pay it &c., alleging they were all persons who traded by way of merchandise &c. A frivolous plea pleaded, and the plt. demurred and had judgment in the B. R. Deft. brought error in the exchequer chamber. Objection was, that the plt. had not declared on the custom of merchants in London, or any other particular place, but had declared on a custom through all England, and if so, it is the common law, and then it ought not to be stated by way of custom; and if a custom, then stated as of a particular place, whence a venue might arise to try it; answered the custom of merchants as to bills of exchange is a part of the common law of which the judges take notice *ex officio*, as held in *Carter v. Downish*. So needless specially to state it as it is enough to say, one according to the usage and custom of merchants drew a bill &c. Hence, all stated relative to the special custom is surplusage, and the declaration good without; so held the judges, and judgment affirmed for the endorsee. There is no doubt but the law merchant is a part of the common law, and the decision in this case by all the judges must have been on the ground, that this note came within the law or custom of merchants. Yet it does not appear that this was made a question, and also the deft. who might have made this question, pleaded a frivolous plea in the B. R. Was this an adversary suit? See *Hodges v. Steward*; *Sarsfield v. Witherly*, ante s. 4.

Salk. 133,
Hill & al. v.
Lewis.—

6 Mod. 147.—2 Stra. 1175.—1 Wils. 147.

§ 15. Moor, a goldsmith, gave two notes payable to Lewis, the deft.; he Oct. 19, 1693, endorsed them in blank and

delivered them and eight others to one Zouch to whom he was indebted; he the same day delivered them to the plts., being goldsmiths, and they paying for them. Moor soon after failed, and the main question was if the plts. had seasonably demanded payment of him. And Holt C. J. held, that goldsmith's bills were governed by the same laws and customs as other bills of exchange, that every endorsement is a new bill; and that every endorser is liable as a new drawer. That by custom every endorser is only liable in default of the first drawer; that every endorsement must have convenient time to demand payment; and that the assignment of a note not payable to order, (as was the case of one of these notes) charges the endorser, not the drawer; as such a note not payable to order is not assignable; but that the words, *or to his order* give authority to the payee to assign by endorsement, and is the first drawer's agreement to answer it to the assignee. This case weighs but little; for in it we have only Holt's opinion, who nearly at the same time joined in the decisions in *Clark v. Martin*, and the other cases cited above on the other side of the question. He too in this case, *Hill & al. v. Lewis*, spoke only of goldsmith's bills. And as to a seasonable demand, and the liability of an endorser to his immediate endorsee on a note, one of them not made payable to order, so not negotiable. And as the plt. declared first as on a bill of exchange; 2. a *mutuatus*; 3. an *indebitatus assumpsit* for money laid out for the deft's. use, all Holt said might well have relation to the endorser's liability to his endorsee on one or more of these counts, and it is more reasonable to suppose Holt was thus to be understood, than to suppose he palpably contradicted himself in this and the other cases cited on the same subject much agitated, and all about the same time. Further, what could a note not payable to order or bearer, and so in no manner negotiable, have to do with the custom of merchants, or with the rules of law relating to a money note or bill payable to order? And there was no separation of the notes.

§ 16. This was an action on a note to pay sixty guineas on a contingency, so not within the custom of merchants on that account. And so judgment for the deft., the plt. declaring on that custom; but it was said if the note had been given by way of commerce it had been good. See the declaration at large and demurrer to it; and as in *Hill v. Lewes* the plt. declared as on a bill of exchange. The dictum seems to have been only the saying of counsel. It does not appear 4 Mod-
ern, that the judges did any thing more than give judgment for the deft., therefore this case is not very material. See *Bromwick v. Lloyd*, ante s. 4 also cited, to prove notes were negotiable before the statute, but on examination there does

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Art. 4.



4 Mod. 242,
244, Pearson
v. Garret.
A. D. 1693.

A. D. 1696,
Bromwick v.
Lloyd.

CH. 24. not appear any question made or decided material to the present purpose. The declaration stated a special custom in London, and a note made according to it to pay £26 10s. 9d. on demand to the plt. not said to order or bearer. Plea was, the deft. lived at Brentford and not at London. Plt. demurred, because the deft. traversed matter not traversable, and because it tended to the general issue &c. Judgment of course for the plt. on the pleadings.

Ld. Raym.
175. A. D.
1697. Pinckney v. Hall.

§ 17. The deft. gave his note for himself and partner, joint merchants, to Hutchins or his order. He endorsed it to the plt. He declared on the custom of England to which the deft. demurred: 1. Because the declaration being by the custom of England &c. was ill, for the custom of England is the law of England, which the judges notice *ex officio*: 2. Other objections not material &c. Judgment for the plt.; this too of course was on the pleadings.

3 Salk. 67,
Nicholson v.
Seldnith.
9 W. III.

§ 18. If a bill be made payable to A or bearer, the bearer must sue in A's name &c. (old notion.) "But if made payable to A or order, an assignee may sue in his own name, because the order must be made by endorsement or the like, to shew the drawer's consent;" same case 1 Ld. Raym. 180, where it is said a goldsmith made a note promising to pay one Mason or to bearer £100, and Mason delivered it to the plt. for £100 value received. Held as above. The only point the court had to decide in this case was, as the law then was, that the bearer could not sue in his own name; and it is hardly to be supposed that the court, as a court, gave a formal opinion upon a contract to order not before it.

3 Salk. 67,
68, Jordan v.
Barloe.—
12 W. III.

§ 19. In this case Salkeld states, that a bill drawn payable to W. R. or order, is within the custom of merchants, and may be negotiated and assigned by the custom and the contract of the parties; otherwise if to bearer, and cites *Hodges v. Steward*. A bill is mentioned in this case and not a note.

3 Salk. 68,
Williams v.
Field.—
5 W. III,
Hodges v.
Steward.

§ 20. Ruled, that where a bill is drawn payable to W. R. or order, and he endorses it to B, and he to C, and he to D, D may sue any of the endorsers, because every endorsement is a new bill, and implies a warranty by the endorser that the money shall be paid. In this case also the report is as to a bill. And 3 Salk. 68, 69, decided if a plt. declare on a custom for the bearer to bring the action, and the deft. demur and does not traverse the custom, the plt. must have judgment. Here was judgment merely on the pleadings against the rule the bearer could not sue. The plt. it will be observed in some of the prior cases recovered on this principle; where he declared on a special custom in London and the deft. did not traverse it. This was enough to entitle the plt. to judgment, though on proper pleadings he could not have had it.

§ 21. Many other cases are cited to shew notes were negotiable before the statute, as *Cromwell v. Floyd*, Newman's case, 12 Mod. 241 decided, a bearer of a bill is not liable to be sued; 5 Mod. 367, *Woolvil v. Young & al.* turned on a defect in the declaration. *Hawkins v. Cardy*, 1 Salk. 65, was decided on the assignment of only a part of the debt due; and any thing said further was mere *dictum* and *ex gratia*. 12 Mod. 244, *Lambert v. Oakes*, 10 W. III, was only Holt's opinion, and only decided there must be a demand on the drawer before the endorser is liable: I say Holt's opinion, because it will be recollected that a few years after this he was so clear and decided in *Clerk v. Martin*, *Buller v. Crips*, &c. against the negotiability of notes before the statute. Therefore, we must be careful how we admit *obiter dicta* ascribed to Lord Holt inconsistent with his subsequent settled decisions. See *Lambert v. Oakes*, Ch. 20, a. 15, s. 5; 12 Mod. 380, *Carter v. Palmer*; 12 W. III. So in this case we have only Holt's opinion, and only decided a promise to one and bearer is not negotiable, and as to what might seem further could not have the weight of authority. A few other cases have been cited to prove this negotiability before the statute not very material.

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Several cases.

§ 22. On the whole, a great number of cases at different times have been cited, mostly noticed above, to prove that a money note payable to order, was in its nature and before the said 3 & 4 of Anne negotiable, so that the assignee of endorsee of it could sue and recover it in his own name, and to his own use, against the maker or any endorser by the plt's. endorsee. But on a close and critical examination of the cases it will be found their weight is far inferior to their number, so that they have generally been decided on the forms of pleadings, and upon collateral points in them; often without argument, and that many of them embrace only Lord Holt's opinions and *dicta*, clearly overruled if reported correctly in the solemn decisions, in which he afterwards confidently joined, subsequently made in *Clerk v. Martin*, *Buller v. Crips*, *Potter v. Pearson &c. &c.* On a full view of them this inquiry arises, namely: if they, as some urge, clearly proved this negotiability of notes in question, why was so little notice taken of these cases by court and counsel in *Clerk v. Martin*, and the latter cases well considered, and which settled the law at least for the time, against such negotiability, and which produced the said statute of Anne. Also it is to be observed, that parliament in passing this act expressly recited, that it had been decided that these notes were not so negotiable, and took no notice of different decisions, not so much as to say there were doubts on the subject.

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§ 23. The fair view of this subject seems to be in this manner. Long before the statute of Anne, there were much in use, and beneficially, among traders and brokers, the verbose notes called bills of debt, above described, at Amsterdam and many other places on the continent. As trade and money operations increased in England, these instruments, and short notes somewhat on the same principles, became useful there, and especially in Lombard street, and more especially among the goldsmiths of that street, the then brokers &c. Such instruments, not proper bills of exchange, being found to be very useful and convenient, the merchants, traders, and brokers, and some judges and lawyers favoured them and countenanced their negotiability; and endeavoured to draw them within the custom of merchants, and to rank them among real bills of exchange. Hence, sometimes they were sued as such, and by *bearers* and by *endorsces*; and these sometimes recovered judgments, without argument; sometimes on the deft's. default, or defects in his plea; sometimes because the plt. laid a special custom, and declared on a note brought within it, and the deft. *admitted the custom by not traversing* it, as in *Hodges v. Steward*, above. And several forms of declarations in such cases, got inserted in *Rastell* and other books of entries. Still, as *Malynes* stated, these proceedings on these notes, as on real bills of exchange, and as so negotiable, were against the principles of the common law. At last the attention of Lord Holt, and of the other judges of the king's bench, was particularly drawn to these proceedings, and to this subject; and so much so, that Lord Holt was led to say the goldsmiths of Lombard street were attempting to make new law, and to oppose them *totis viribus*, and their new proceedings; while the judges of the common pleas, and the barons of the exchequer did not for a time, at least, lean against them, but who concurred with the judges of the king's bench; when early in the reign of queen Anne, the subject was much discussed, and it became necessary to decide the cases strictly, according to law; and when too, the strong and clear distinctions came to be made between *inland bills*, and *promissory notes*, which were made in the said statutes of W. 3, and of Anne. Distinctions so strong and clear, that it is difficult to conceive how reporters ever confounded such bills and notes, after the said statute of W. 3 was passed.

On a careful review of this subject, we may conclude, though not without some doubts, that no *chose in action*, proper bills of exchange excepted, is assignable, negotiable, or endorsable, as aforesaid, in any state in the Union, but in virtue of some statute adopted or enacted.

§ 24. A bond is not assignable on the statute of Virginia, of 1748, &c. so as to enable the assignee to sue in his own name; as where the condition is *collateral*, and it is necessary to *assign breaches*, and to call in a jury to *assess damages*. But generally, a bond to be so assignable must be for the payment of money and a sum certain. *Craig v. Craig*, 1 Call. 483; *Henderson v. Hepbiern*, 2 Call. 232.

CH. 24.
Art. 5.

6 Cranch 82,
Lewis v.
Harwood.

§ 25. *Notes &c. partially assignable in Virginia*. By her statute, no right is given to sue the assignor. Such an action can be supported only on the assignor's implied promise, raised by law. Hence, can be only between the assignee and his immediate assignor. As the assignment is made to a particular person, the law implies a promise to him, and to him only; but it raises no promise to any other; there is no fact on which to imply such promise; none between A and C, when A assigns to B, and B to C; there is a privity between A and B, but none between A and C. The implied promise growing out of the assignment or endorsement is not viewed as having been made, by said statute of Virginia, assignable; so the assignee of that promise cannot sue *indebitatus* assumption on it. But C may sue A in *equity*, as the endorsee of a promissory note payable to order, cannot in Virginia, *at law*, sue a *remote* endorser, but may sue him in a court of equity. The assignor of a bond in Virginia, is liable to the assignee on general principles, if the obligor prove insolvent; and this is proved generally by the officer's return, *no effects*, on an execution against the obligor.

1 Cranch 290,
Mandeville v.
Riddle.

Machie & al.
v. Davis, 2
Wash. 219.

3 Cranch 311,
Goodall v.
Stuart.—2
Hen. & M.
106.

ART. 5. § 1. If A become indebted to B for goods sold, work done &c. &c., there are sundry cases in which A may discharge his debts, absolutely, or conditionally by making, assigning, or endorsing to B a *chose in action*, as Ch. 20, a. 19, ante, several cases. See also Ch. 20, a. 20, s. 6 to 10, several principles and cases of paying in notes or bills. See further Ch. 165, sundry cases when a bill pays a debt or not.

§ 2. Several rules to be extracted from the cases in the books, and usually, a contract of a superior obligation discharges one inferior, as a bond or simple contract—2d. If the creditor *accept in satisfaction of his debt*, his debtor's contract or that of a third person, absolutely and fairly—3d. If he accept such *conditionally*, and parts with it so that the debtor cannot have it if he pay his first debt—4th. If the creditor for his goods sold, &c. accept of the buyer a note or contract of a third person, and is guilty of laches in getting it paid, or indulges him beyond his contract—5th. Or if the seller or creditor take his debtor's contract, or that of a third person, (not as absolute payment) and so manage it that he cannot, or

CH. 24. do not restore his debtor to the full benefit of it he would have
 Art. 5. had if he had not parted with it, then it is payment for the goods, &c.

3 Cranch 311,
 Harris, in error
 v. Johnston.

§ 3. *When does a Virginia note pay a prior debt?* The action was *assumpsit* for goods sold and delivered, and money had and received. Plea, *never promised*, by Harris. Johnston, the original plt., at the time of the sale, received of Harris the note of Clingman & M'Gaw, payable to the order of John Towey, or order, endorsed by him in blank to Harris, payable April 2, 1798, when paid to be in full for the goods, whence Johnston received this note conditionally, endorsed to him in blank by Harris, when he had the goods; and afterwards Johnston endorsed it to John Dunlap, who April 19, 1798, sued Harris in the court of Hustings in Alexandria, on his endorsement, striking out Johnston's name, and making Harris' endorsement, direct to Dunlap. Judgment for him, as by the law of Virginia the endorsee may recover against his *immediate* endorser, though not against a *remote* one *at law*. Harris appealed to the district court of Dumfries, which reversed the Hustings judgment; and Dunlap appealed to the court of appeal, which affirmed the judgment of the district court. The reversal was because in Virginia, Dunlap could not strike out Johnston's intermediate blank endorsement, and thereby make Harris, Dunlap's immediate endorser. Held, Johnston could not recover for the goods, as he had received the note as conditional payment *and passed it away*; for the endorsements of the note passed the property in it to Dunlap, and evidence it was sold for a valuable consideration; and then to recover for the goods would be receiving double satisfaction. Cited Ransdale v. Morgan as in point, Ch. 165, a. 3. In the case of Young v. Clarke the note had not been passed away; and Harris was liable in equity on his endorsement to a *remote* endorsee. And if Harris paid for the goods, he was entitled at any rate to the note, as beneficially to him as it was when he parted with it.

Gordon & al.
 v. Brown's
 executors.

§ 4. Partners, to recover on a Virginia bond taken to one of them, his heirs &c., must aver it was taken to their use, or that he or his representatives assigned it to them. 2d. The assignee must state the assignment in his declaration. 3d. A bond, dated Jan. 4, 1775, will not support a declaration stating one as bearing date, Jan. 4, 1773.



CHAPTER XXV.

ASSUMPSIT. CONSIGNMENTS.

§ 1. The *general principle* is that "the *consignor of goods* may in case of the *insolvency of the consignee*, stop them *in transitu*, any time before they get into his *actual possession*." A "*constructive delivery to the vendee*, is not sufficient; but an *actual delivery* is necessary to divest the vendor's right to stop the goods *in transitu*;" and this on equitable principles, first established in *chancery*, and since adopted by the courts of law. This rule was first laid down by Lord Hardwicke, in *Snee v. Prescott*, 5 Burr. 2680.

See Bill of Lading, Ch. 21.—3 T. R. 464, *Ellis v. Hunt*. See Ch. 132, a. 7. —1 Johns. R. 214.—1 Ld. Raym. 27.—1 Atk. 248.

§ 2. The cases seem to turn on what is an *actual delivery* to, or an *actual possession* in the *consignee* or *vendee*. This question often arises, not only under the head of consignments, but under many other heads; as of assignments, bills of lading, factor, lien, possession, &c. So when the possession of the common carrier is that of the vendor or vendee. See *Carrier*, Ch. 23, several cases.

§ 3. Consignment in commerce, is the delivery, or making over goods to another; and goods are said to be consigned to a factor, when they are sent to him to be sold, whether on the delivery to him they are so mixed with his goods as not to be distinguished from his, or kept separate and distinct from them.

1 H. Bl. 357, *Mason*, in error.

§ 4. One Harvey loaded goods on board a ship, and *consigned them to Evans*; but by the invoice they appeared to be the property of Harvey. Evans sued Martill for the goods. The court held that the *invoice* signified but little in this case; but that it was the consignment of the goods, which vested the property in Evans. But had they been consigned to him *on account of Harvey*, he would have only been factor to Harvey, and Harvey must have sued for them. When the consignee may sell. See *Lichborrow v. Mason*, ante; and 5 Term R. 674, 633.

3 Salk. 290, *Evans v. Martill*.—12 Mod. 156.—1 Ld. Raym. 271.—1 D. & E. 659.—3 Esp. Cas. 12.—8 D. & E. 380.—4 East 211. 4 Burr. 2046.

§ 5. By this act, and the other custom house acts, the owner or consignee may enter the goods or cargo at the custom house. But this does not affect the right of property that must be looked for and found, on general principles of law.

United States act, July 31, 1789, sect. 13.

§ 6. A *consignor* has no right to stop the goods *in transitu*, when the *consignee has paid the value of them*; but has if only a part of them is paid for. See this case Ch. 30. If

3 T. R. 119, 123, *Kenloch v. Craig*.—7 T. R. 440.

CH. 25. goods be assigned to a factor, and before they come into his *actual possession*, he accepts bills drawn by the consignor, and pay part of the freight, and become *insolvent*; the consignor may stop them *in transitu*. And there is a great difference between *payment* and *liability to pay*. "In every instance where goods are sent by way of sale, the party to whom they are sent, is liable to pay; but till he has paid, in case of failure, the owner may stop them *in transitu*. Paying a part of the freight as factor, cannot be considered as taking possession of the cargo. When payment is made, the sale is complete, and the doctrine of a *lien* does not apply. A factor's lien ceases when he parts with the possession, and he cannot stop *in transitu*."

1 East 4, 5.
Swett v. Pym.
—3 D. & E.
467, Hunt &
al. v. Ward.

§ 7. In this action, brought by Hunt & al. assignees of Bennett & al. against Ward, the goods had been sent by orders from the vendee to a middle man, between the vendor and vendee; and the court held that they might be stopped *in transitu*, on the bankruptcy of the vendee. P. 469, Buller J. said, "there may be cases where, as between the buyer and seller, if no bankruptcy or insolvency happen, the goods are considered in the possession of the buyer, the instant they go out of the possession of the vendor: as if A order goods from B, to be sent by a *particular carrier*, at his risk, the delivery to the carrier, is a delivery to the vendee, to every other purpose; but still if he become a bankrupt before the carrier *actually* deliver them to him, I should hold the vendor might seize them; because that is only a *constructive delivery* to the vendee: but an *actual delivery* is necessary to divest the vendor's right of stopping the goods *in transitu*," and this right "is founded only on equitable principles," "originally established in courts of equity, and since adopted in courts of law."

2 Rob. Ad. R.
111. The
Paschel de
Bilboa.
Material cas-
es.—8 Cranch
317, 335, 382.

§ 8. *The effect of consignments in war and peace.* If freight is to be paid in an enemy's country, it very strongly argues that the property is in the consignee. In him, goods ordered vest on delivery to the master in time of war. In time of peace, it may by agreement be otherwise: for then the interest may continue in the consignor till arrival. In war this is not allowable. And it is necessary the bills of lading declare on whose account and risk the goods are shipped. 1 Johns. R. 1.

Lex. Mer.
Am. 47.

§ 9. Where goods are consigned, the consignee by the laws of the United States, is deemed owner, for the purpose of paying the duties.

8 D. & E. 330,
334, Dawes v.
Peck.—6
East, 22.—Abbott 3d. ed. 351.

§ 10. Delivery of the goods to the carrier appointed by the consignee, is a delivery to him. As where a trader in

Warwickshire ordered goods from a dealer in London to^a be sent by a *particular carrier*. The goods (gin) were delivered accordingly, but were left on the road till the time expired for the transportation mentioned in the permit; they were seized accordingly. The dealer who consigned them, paid the booking, and brought his action on the case against the carrier, to recover the value. Judgment for the defts. on the ground the property had vested in the consignee, and therefore, to him only was the carrier liable.

§ 11. And Lord Kenyon C. J. said he could not admit (as was urged) the "right of property, on which this action is founded, is to fluctuate according to the choice of the consignor or consignee," so that either may sue the carrier. He is the person to sue, who has sustained the loss by the carrier's negligence, and he is the owner of the goods. After the above delivery, the vendee will run the risk: the *damnum et injuria* was to him, and not to the consignor. *Davis v. James*. The consignor was allowed to sue the carrier, because he was to answer to him the price of the carriage: "he stood therefore, in the character of *insurer* to the consignee, for the safe arrival of the goods." And in *Moore v. Wilson*, the court went on the same ground. The action rested on the agreement between the carrier and the plts. who were to pay him. 1 Johns. R. 214, 228; *Hardress*, 321; 1 Atk. 245; 1 Stra. 129.


Moore v. Wilson, 6 Burr. 2660.

§ 12. Though it be a general rule, that if goods be delivered to the consignee's carrier, it is a delivery to him, yet the consignor may take on himself actually to deliver them to the vendee, and to run the risk of the conveyance; but to ascertain which, consignor or consignee, is to bear a loss, the usage and course of trade is always to be considered; and see *Goodall v. Shelton*, Ch. 11, a. 4.

Vale v. Boyle, Cowp. 294.

§ 13. *Replevin* for salt and coals: deft. claimed them as the property of L. & W. Weeks, and prayed a return, damages and costs; and traversed the plt's. property and issue. Logan & Co. at Liverpool, in England, (plt. one of them) shipped the goods on the credit and account and risk of said L. & W. Weeks, and consigned the same to them or their assigns. Before the ship sailed from Liverpool, the shippers informed of the insolvency of the consignees, refused to let the ship sail, under the said shipment of the cargo; but consigned it to the plt. and took new bills of lading accordingly. Logan & Co. had previously agreed to accept the drafts of L. & W. Weeks, or to advance them cargoes on credit to a limited amount; and they charged them the salt and coals in question. Lund attached them as the property of L. & W. Weeks; who became insolvent after the shipment. Held,

7 Mass. R. 453, 468, *Stubbs v. Lund*, a deputy sheriff.

CH. 25.  Logan & Co. had a right to stop the goods *in transitu*, as the credit contemplated was predicated on the supposed ability of L. & W. Weeks to pay: 2d. That this right to stop *in transitu* goods, shipped on the credit and risk of the consignee, remains until they come into his actual possession at the end of the voyage, unless he shall have before sold them and assigned the bills of lading to the purchaser: 3d. In all cases where an actual possession of the consignee, *after the end of the voyage*, is provided for in the bills of lading, the right of stopping *in transitu* remains after the shipment, whether the consignee be the hirer or owner of the ship, or the shipment be made on a general ship. But if the goods are shipped for a foreign market, and are not to be transported to the consignee, the right of stoppage ceases on the shipment. L. & W. Weeks owned the ship, and the master appointed by them. Same facts and principles, 9 Mass. R. 65 to 73, Ilsey & al. v. Stubbs.

8 Cranch 317,
334. The
Merrimack.

§ 14. *When goods shipped remain in enemy consignors or not.* This was an appeal from the Circuit Court in Maryland. Facts were; the ship Merrimack, owned by citizens of the United States, sailed from Liverpool for Baltimore a few days before our war with Great Britain in 1812 was known in England. Her cargo was shipped by British subjects, and consigned to citizens of the United States. Oct. 25, 1812, she was captured in the Chesapeake by an American privateer, and the goods libelled as prize, were severally claimed by sundry citizens of the United States. W. & J. Wilkins claimed eleven cases &c. marked W. & J. W., made up for them by their order before the war was known in England, by a manufacturing company; one member of it resided in England, the other an American, residing in the United States. The bill of parcels was in the name of W. & J. W., and no other invoice of these goods was on board. The bill of lading was in the name of the American partner who was the consignee. The goods were accompanied by a letter to him from his British partner, dated in England, July 29, 1812, saying, with this you will receive the eleven cases &c. for Messrs W. & J. W. of Baltimore, mentioning the repeal of the orders in council &c., adding, "as there may have been some alterations in some of your friends, (insolvency) shipping them to you gives the power of keeping back to you." The whole transaction appeared to be fair. Held, the eleven cases &c. became the property of W. & J. W. when shipped, so not prize, though the Merrimack sailed from England after our declaration of war was known there: But 2, where goods were so purchased and accompanied by invoices, bills of lading, and letters from the British consignors to American citizens for whom bought, and

all the papers shew the property was theirs ; but the British consignors enclosed these documents in a letter to their agent in the United States, an American, and the bill of lading to him also, "on account and risk of an American citizen," and the invoice was headed to the agent ; him, however, the British consignors directed not to deliver the goods to said American citizens in case war existed, until they paid him the cash for them ; held, the property remained in the British consignors, and was prize and condemned. 3. But where goods were so purchased and consigned—but the bill of parcels and invoice were in the name of the American merchants for whom the goods were purchased, and the shipment also expressly made on their account, held the property vested in them and was not prize, though the British consignors in their letter speak of the goods as British property, and the same during the voyage remained at their risk. Story J. dissented in the first case, and it is said also Washington J. and Todd J.


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§ 15. *A consignee has no lien on the goods of an enemy consignor.* An appeal from the Circuit Court of Rhode Isl- and condemning certain British goods captured, on which Thomas Irvin, a domiciled merchant of the United States, claimed a lien &c. He had advanced monies to the enemy consignor to purchase the goods. These goods were shipped by the consignor and shipper, and sent on their account and risk. Held, first, where shippers so ship goods on their own account and risk, their delivery to the master is a delivery to themselves, and not the use of the consignee. The master is their agent, and they may countermand at any time before actual delivery to the consignee, and thus prevent his lien attaching. 2. The case is otherwise where goods are shipped on account and risk of the consignee, except in case of his insolvency. 3. There are no liens in prize courts, except a few created on enemy's property, and in these few they are created by a general law among merchants alone. As in cases in which to secure to neutral masters their freight, not otherwise secured, this general law allows them their liens on enemy's property captured in war &c. 4. If A consign two cargoes to B, purchased by A, and give B his election to accept both within twenty-four hours after the receipt of A's letter, or in that time to reject both ; B in that period accepts one only, he does not make either cargo his, but A may cast both on B, or resume the whole ; and the property remains his, and liable to be captured by his enemy.

8 Cranch
418. The
Frances.—
9 Cranch
186. The
same case.

§ 16. A, an American merchant, during the non-inter- course with England, sent orders to B, a merchant at Bir- mingham, to purchase for him certain goods, and to ship them to A on the removal of this non-intercourse, or probably of

1 Wheat. R.
25, the Mary
& Susan.

CH. 25.  the British orders in council. B purchased them *with his own funds*, and sent them to Liverpool to be shipped, where they were stored. B became embarrassed, and C his friend lent him the amount of the invoice, say £820. 2s. 1d., and B assigned his right to receive this sum of A to C as his security, but no evidence he could interrupt the shipment. Orders in council being removed, B shipped the goods to A, and wrote him that he had shipped them according to his order, in a ship named, and requested A on receiving them to remit the said \$820. 2s. 1d. to C, and C wrote to A to the same purpose. The goods were shipped on account and risk of A, but B in his letter to A said they were C's. Held, first, there was no need of further proof: 2. That the goods were shipped in pursuance of the orders of A, and became his property when delivered for his use to the master of the vessel, if not at an earlier period, so not liable to capture as British property. The main argument for the American captors was, that these goods became the property of C, a British subject and an enemy &c., that he had a right to interrupt the shipment, and hence A was under no obligation to receive the goods and pay for them; so they remained British and enemy's property. But as above, the court did not think they became C's property, or that he could interrupt the shipment, but that B had the control of them so as to execute A's orders.

1 Wheaton's
R. 208, the
St. Joze In-
diano.

§ 17. *Where goods remain the consignors, though purchased by another's orders, and partly with his funds.* (Appeal from the Circuit Court of Massachusetts.) J. Lizaur, a neutral merchant of Rio Janeiro, during our war of 1812 with Great Britain, sent hides to Dyson, Brothers & Co. of Liverpool, and orders to them to buy certain goods for him to a much larger amount than his credit they gave him for his hides. They purchased the goods and shipped them in the St. Joze Indiano, a neutral vessel. The bill of lading did not specify any order or account and risk. The invoice was headed "consigned to Messrs Dyson, Brothers & Finnie by order, and for account of J. Lizaur." In a letter of May 4, 1814, accompanying the said bill and invoice from Dyson, Brothers & Co. to Dyson Brothers & Finnie, they say, "for Mr. Lizaur we open an account in our books here, and debit him &c. we cannot yet ascertain the proceeds of his hides &c., but find his order for goods will far exceed the amount of these shipments, therefore we consign the whole to you, that you may come to a proper understanding with him." The firm of Liverpool and the firm of Rio consisted of the same persons. These goods were captured by, and adjudged good prize to an American armed vessel, on the ground they remained the property of the consignors and shippers during

their transit, and Lizaur's claim was rejected. Both firms represented the same parties in interest. It was contended for J. L., that as the goods were purchased by his order, and partly with his funds, they became his on the purchase, and that nothing was left to the shipper but a right of stoppage in *transitu*, (not applying to this case.) The true ground was, the shipper's kept the possession and control of the goods in themselves and their agents, the firm at Rio, and never delivered them to the use of J. L. The delivery to the master was to the use of the consignee's said firm at Rio. No papers were sent to him. Cited in this case the cases of the Merrimack, the Frances, the Mary and Susan, above, and of the Venus, Ch. 224, a. 9. s. 5.

CH. 25.

§ 18. *General principle.* If the consignor retain the control of the goods in *transitu*, he retains the property; *secus* if he gives the control to the consignee or his agent (independent of stoppage in *transitu* for insolvency.) As if A at Liverpool, sent goods to B in Boston, his agent, to hold them subject to C's order, A retains the control over them, and may give them what direction he pleases until C gives his order. The *Joze Indiano*—generally if the goods go on account of the consignor or shipper, or subject to his control, they remain his in *transitu*. So if any condition be annexed to the delivery to the consignee, they remain the consignor's, though sent in pursuance of the consignee's orders, as the condition of immediate payment or specified security given &c. So where shipped to the shipper's order to be delivered by his agent to the consignee, on the agent's being satisfied as to the payment. One of the Merrimack's cases, above, 4 Rob. 218, 319. But if the shipper consign goods to his agent, but the invoice &c. shows they are for account of the consignee in fact, the purchaser and the consignor sends to him the invoice, bill of lading &c. directly; they are his, as such possession of these evidences of property proves the intention; first case above, Merrimack's case. So if A ship goods to B unconditionally, for C's use, they are his in *transitu*: *secus* if to B with discretionary orders, 1 Wheat. R. 208. They remain the shipper's if he consign them expressly to another, if done without his order or against it, or in a manner different from it as to quantity or kind, for in such case the consignee is under no obligation to accept them, in fact there is no contract between consignor and consignee to change the property. Several cases above, and case of the Venus, Ch. 224, a. 9, s. 5; 1 Gal. 445.

§ 19. If my agent abroad absolutely purchase goods on my account, or actually set them apart to my use by my consent, they become mine immediately on the purchase &c. But if he

Ч. 25. first makes them his own, as if he buy solely on his own credit, they are not mine till he does some notorious act to change the property and make them mine by my consent, expressed or implied, or parts with the possession by an actual and absolute delivery to me or to my use. *The Mary & Susan.*

§ 20. *The belligerent right which forbids a change of property from consignor to consignee in transitu.* In a war, for instance, between the United States and Great Britain, B, a British merchant, ships his goods to a neutral consignee; they are B's property when shipped. By the laws of war and prize they cannot in their transit become the neutral's, but remain B's notwithstanding any acts done by him and the neutral, so long as they are passing the ocean, and will be liable to be captured as B's by his enemy. These laws of war and prize are not so much founded in mere rights, as in national policy. Their object is to disable the belligerents or our enemy, to consign fraudulently or under cover, his ship or goods in *transitu* to a neutral, and thereby deprive the consignor or vendor's enemy of his belligerent right of capture. These laws, therefore, forbid all such transfers, and the prize court hold them void. As to vessels they are viewed as belonging to the country whose flag and pass they bear, and a transfer to a neutral is of no avail if they be habitually employed in the trade and navigation of an enemy's country, 1 Rob. 26; 5 Rob. 22, 161. But generally a ship's character is determined by her owner's domicil. If a neutral constantly employ his vessel in my enemy's trade and navigation, such neutral is estopped by his conduct, declarations, and oaths, to say she does not belong to such enemy's country; but he only is estopped. But as against him other parties may say she is neutral. Still, however, a neutral may fairly purchase my enemy's merchant ships in time of war, and when so purchased all are bound to respect their neutral character so long as they are in neutral employment; but the purchase must not be while the ship is in *transitu*. It must be well authenticated with the usual evidence, for a reasonable consideration, and the sale must be absolute and complete. Authors generally agree in these positions.

CHAPTER XXVI.

ASSUMPSIT. CUSTOMS AND PRESCRIPTIONS.

ACTIONS of *assumpsit* in several cases, rest on the *customs* of the country ; as actions against and by carriers, inn-keepers, farriers, factors, taylors, and other persons who are by law obliged to perform services for a reasonable hire or reward. These are, generally considered, under their several heads, when the principles and pleadings peculiar to each are brought together. See also, Flats, Mills, Tolls, &c. &c. See Prescription.

There are also, in regard to customs, certain *general principles*, which may properly be here concisely examined ; and actions of *assumpsit*, in some cases, founded on *customs* may be noticed in this chapter, which do not come under any of the particular heads mentioned. Custom and prescription are all one ; Cro. El. 313 : only difference, one is *local*, the other *personal*. Co L. 113. The true test of a commercial usage is its having existed a sufficient time to have become generally known, and to warrant a presumption that the contracts are made in reference to it. 1 Caine's R. 45. Smith v. Wright.

ART. 1. *General principles.* As no action or plea can be supported, which rests on a *bad custom*, it is necessary in this place to enquire what is a *good* and what is a *bad custom*.

Custom is *unwritten law*, and respects *place*, as prescription respects *persons*, and every custom is construed strictly. 1 Bac. 671.

Several things are essential to make a custom good and valid. 1 Bl. Com. 76,
78.—Co. L.
110

§ 1. A custom must have been *time out of mind* ; for if any one can shew when it began, it is not a good custom. 1 Bac. Abr.
670.

§ 2. It must be *continued* without any interruption, or temporary ceasing of the *right*, otherwise, of *possession* or *enjoyment*. Co. Lit. 113,
b.

§ 3. It must have been *peaceable*, and *acquiesced in*, and *not disputed at law or otherwise* ; for customs owe their origin to *common consent*. This cannot be intended in disputed cases.

§ 4. It must have been *reasonable*, or rather not *unreasonable* ; but if one plead a custom, he is not bound to shew, it had a reasonable commencement. 6 Com. D. 77.
—11 Mod.
161.

§ 5. It ought to be *certain*, so that it may be known and understood, as to the persons claiming, the thing claimed, &c.

CH. 26.
Art. 1.

1 Ld. Raym.
485.

§ 6. It ought to be *compulsory*, and not left to each one's option to use or obey it or not.

§ 7. And customs must be *consistent* with each other. If contradictory they destroy each other. It is not to be presumed a custom originated in an act of parliament.

§ 8. The foundation of a custom is *consent*. As no law can oblige a people, without their consent given in some form or other; so, when they do consent, and use a certain rule as a law, such rule is a law, in many cases; but it may be void in some cases, as being repugnant to a more general law.

3 Salk. 112.

§ 9. This consent to a rule or law is expressed in writing, or implied by *actions*. Where by actions, it is *common law*, or *custom*; custom, if confined to a *particular* place; common law, when *universal*. *Actions repeated and continued by the same rule*, is evidence of assent to it, by those who do those acts; but the original reason of the consent need not be shewn. Dougl. 131, in Cocksedge & al. post. The beginning of a custom must not appear to be *unreasonable*, "for no usage can be good which was not so *ab initio*." But a custom is not bad because it is contrary to the common law; for many customs are so, as the custom in Kent of *Gavelkind*, so the custom of *Borough English* in some places. Nor is a custom bad because it is *injurious to private persons or interests*, if it be for the *public good*. Hence, custom to pull down houses in a great fire to prevent it spreading is good; so to turn a plough on the headland of another is a good custom, for this favours and promotes husbandry.

1 Mod. 161.

Dougl. 203.

§ 10. But a custom injurious to the *public*, or to *many persons*, and beneficial only to some individuals, is bad; as many persons owning most of a pasture shall not put in their cattle till some minor owner does; for such a custom must have arisen in *tort* or *usurpation*, and cannot have had a reasonable commencement. The custom of a place cannot extend beyond that place. In all pleadings of a custom, it ought to be *positive that within such a place there is such a custom*; this is alleged in the *land*, but *prescription* in the *person*.

Sid. 237.—
2 Lutch. 1317.
—3 Salk. 113.
—6 Co. 60,
case of Gate-
ward.

§ 11. When *foreign written laws*, as the Pandects, Codes, Institutes, &c. are adopted and used by custom in the English courts, or in the United States, they are a part of the *unwritten* or *customary* law. They have force merely because adopted, and have been *immemorially* used.

Cunningham
79, 80.—
1 Bl. Com.
76.

§ 12. The *custom of merchants* is a part of the *common law of the land*, and the courts *ex officio* take notice of it accordingly. But this custom of merchants must be controlled by adjudged cases, 2 Burr. 1216, *Edie v. E. I. Company*. It arises from general established law, and not from special local usage; nor the opinion of merchants &c.; but may be proved

by their understanding of it; 1 W. Bl. 417; 2 Burr. 1226; 6 East 202, Parr v. Anderson; 1 Cain. Smith & al. v. Wright; 2 John. R. 327. So other general customs the courts in like manner take notice of, and they need not be pleaded specially as English statutes, as common law adopted here being general they are properly common law, and not strictly custom, which is limited to some place, part of a state or nation, as is gavelkind. But particular customs must be specially pleaded, and the existence of them shewn, and also it must be stated and proved, that the thing in dispute is within them. And if the plt. declare on a particular custom, and the def. confess it by his demurrer, the plt. shall have judgment, though there in fact be no such custom, for the parties agree it exists; and the court cannot take notice there is no such private or particular custom, but otherwise of a general custom.

CH. 26.
Art. 2.



So in stating an antient custom the exceptions to it must be stated; if not, the custom stated and the one proved will be different. If a bad custom be stated in the declaration, it is not aided by assigning a breach in a good part.

Cowp. 62,
Griffin v.
Blanford.—
Rob. 89.

§ 13. Many customs may have had a reasonable commencement, and so be good in another country for reasons existing there, that cannot be applied in this country. Such as most of the customs in England founded in the feudal and church systems.

§ 14. But in regard to some customs there, the reasons which made them good or bad in that country make them so in this. Custom is local usage and not annexed to any person, and prescription is a mere personal usage annexed to some person or persons.

2 Bl. Com.
265.

ART. 2. *Good customs, further cases.* § 1. As a custom to dig gravel in the adjacent land to repair a way is good, so to have a watering place in the adjacent land is good; and so to dig ballast, for these things are for the public good, and might well have a reasonable beginning founded in the consent of those concerned. So a custom to dry nets on another's land is good. And so a custom to cut rushes in the Lord's waste for one occupying a house &c. and having common there, as against a stranger. So a custom to distrain the parts or goods of a ship for the port duties on the goods shipped on board is good; here the duties were for repairing the port.

3 Salk. 278.
—3 Cro. 664.
—3 Lev. 160.
—6 Co. 60,
Gateward's
case.—
3 Wils. 458.
—Doug. 725.
—6 Co. 84.—
2 W. Bl. 926,
Bean v.
Bloom.—
3 Wils. 456.—
12 Mod. 216.

§ 2. In these customary claims and rights these distinctions are taken in Gateward's case, and generally admitted in subsequent cases: 1. That every inhabitant of a town may claim a discharge by custom of his soil, as a modus to discharge him of tithes; but cannot by custom claim to charge the soil of another, or a right in his soil.

6 Co. 60, 61,
Gateward's
case.—Hob.
86.

CH. 26.
Art. 2.

4 T. R. 717,
Grimstead v.
Marlowe.

§ 3. Second, he may claim an easement in the soil of another as a way &c., and what may be essential to repair it. But he cannot by custom claim an interest or profit to be taken or had in the land or soil of another. But a profit *aprendre* must be by prescription in the person, and not by custom in the land; and the law requires that every prescription have a lawful beginning, a custom not, but only a reasonable one, for a person rests his prescription on a supposed legal grant since lost, but a custom rests on the consent of the people of the place, for among inhabitants some may be only tenants at will, and some mere residents only, and the interest as common of pasture &c. cannot be released; for if one inhabitant of a house release and then move away, and one takes his place, he may claim &c. But a corporation, time out of mind, may prescribe for itself and all its members to have common, per Buller J.; 4 T. R. 719; and 1 Saund. 339, 343. According to this case no deft. can claim a profit *aprendre in alieno solo* by custom of the place.

1 Saund. 339,
Miller v.
Spateman.
This case at
large, Ch.
173, a. 11.

§ 4. This was trespass for breaking and entering the plt's. close &c. Plea, as to all except &c. not guilty, and issue. And as to the said trespass with two gueldings &c. *actio non*; because the place where &c., and from time whereof &c. were parcel of a certain common field in Derby. That this was an antient borough, and that the deft. was one of its burgesses, and they from time whereof &c. to — were a body politic &c. by the name of —, and then incorporated by the name of — and prescribes in the said corporation for common in the place where &c., as one of the burgesses for all their commonable cattle. Plt. demurred.

3 Burr. 1866.

§ 5. Held, a corporation may prescribe for common in gross for cattle *levant* and *couchant*, within the town, but not for common in gross without number, that a corporation does not lose its franchises by a change of its name; but will retain under its new name the possessions it before had. And so by its new name is subject to old debts and demands.

Dougl. 119,
Cockridge v.
Fenshaw.

§ 6. If a duty be payable on corn imported into a city, yet a custom to exempt citizens from paying it, being factors, is good, though the duty be to the city. This exemption to these free factors, or a return of the duty to them, may reasonably be to encourage them to import corn.

1 Bac. Abr.
670.

§ 7. By the custom of a town an infant may bind himself an apprentice, or make a feoffment, at the age of fifteen years, as in gavelkind.

Carth. 357.—
Salk. 248,
Venhistone
v. Elden.

§ 8. If a corporation be bound to maintain and repair a port, it is a good consideration for a customary duty on goods there, and the master may be chargeable and the vessel sails &c. distrained for it.

§ 9. It is a good custom for all the inhabitants of Thiberton to cut rushes on Thiberton common. The plt. proved he was an inhabitant, and that there was a custom for every body inhabiting there to cut and take rushes in that place. But see *Bean v. Bloom*, post, is contra, but occupiers may. CH. 26.
Art. 2.

§ 10. A custom for a particular person to have the sole use of a trade in a certain place may be good, if he have stock sufficient to serve the place. The same for a corporation, for all concerned may agree to this effect. 3 Wils 332,
Rackham v.
Jesup.
10 Mod. 131

It is a good custom, that a person and all those whose estate he has, have been seized of a mill, time out of mind, and "that all the inhabitants within the parish ought to grind all their corn which they expend in their messuages or tenements at the said mill." For this custom might have a reasonable beginning by agreement at the erection of the mill; but there must be a mutual consideration, and the owner must keep his mill in repair. But otherwise, as to corn they sell. For it might be a reasonable contract, originally for the mill owner to agree to keep a mill in order, in consideration they engaged to grind at it all the corn they used or spent in their families. And it was mutual and sufficiently certain for them to agree to do so in consideration of his engagement so to keep a mill. But as to corn sold, the consideration is wholly uncertain. *Dougl.* 218. Willes 654,
Drake v.
Wigglesworth.

Hob. 189,
Hasbin v.
Green.

Cort v. Birkbeck, Dougl.
201.—
16 East 78.

§ 11. So a custom is good for the tenant to have the way going crop, *Wigglesworth v. Dallison*, 1 Phil. Evid. 485. Willes 206,
Millechamp
v Johnson.—
2 H. Bl. 394,
Fitch v.
Rawley.

§ 12. So a custom for all the inhabitants of a town to play at all lawful games in a close at all reasonable times of the year, is good; and all times will be construed all reasonable times. But not for all persons for the time being in the town; not for all rural sports, as some may be improper, id.

So for surveyors duly chosen to destroy corrupt victuals exposed to sale. So a custom to make a by-law to oblige a person to take an office under a penalty, is good. 1 Mod. 202.—
12 Mod. 296.

§ 13. *Towing paths* may be good by usage or custom, but not of common right. There were no towing paths at common law on the antient banks of antient navigable rivers; but all such paths have originated in customs in certain places. This matter was decided in the case of the river Ouge. 1 Burr. 292.
—3 T. R.
256, Hall v.
Herbert.

§ 14. This country has been settled long enough to allow of the time necessary to prove prescription. There is, therefore, the same principle in regard to customs. 6 Mass. R.
90, Rust v.
Low & al.

§ 15. All laws bind by the assent of the people. This may be expressed, as well by facts as by words or in writing, and where it is contrary to the general laws of the land, it prevails where it has obtained the force of law. "*Consuetudo ex causa certa rationabili usitate privat communem legem.*" And yet it is laid down in many books, that a custom contrary to law 1 Bac. Abr.
669.—Co. L.
13, 110.—
4 Co. 69.—
8 Co. 62.—
Lit. Inst. 37.

CH. 26. is void, but on examining the cases generally it will be found
 Art. 3. that a custom to be bad and void must not only be against law,
 but also unreasonable. Therefore, customs in courts in delay
 of justice are void, not merely because they are contrary to
 the rules of law, but because also they are unreasonable and
 injurious to the public. And a right to glean after harvest is
 a good custom, but it must be exercised under proper circum-
 stances and restrictions, 4 Burr. 1925.

Salk. 287,
 Watson v.
 Sparks.—
 Rex v. Price.

3 T. R. 271,
 Noble v. Du-
 rell.

ART. 3. *Bad customs—further cases.* A custom that every
 pound of butter sold in a particular market-town &c. weight 18
 ounces, is bad; for it is an attempt to lay aside the legal
 weights of the government.

2 Inst. 56.—
 Rol. Abr. 564.
 —1 Bac. Abr.
 674.—
 10 Mod. 133.
 —3 Salk. 279.

§ 2. So it is a bad custom to oust a man of his inheritance,
 without action or answer in any town. So a custom is bad to
 try an issue in an inferior court by six jurors. This is unrea-
 sonable, and every unreasonable custom is void. Prescription
 cannot be by one who hath an estate for years.

Mod. 47,
 Haspart v.
 Wills.—Vent.
 71.—Sid. 454.
 —1 Bac. Abr.
 675.—2 Lev.
 96, 97, Pre-
 deaux v.
 Warn.—Salk.
 269.

§ 3. So if a town or city, time out of mind, has maintained
 a wharf on a river, for unlading goods brought up to the town
 or city, it is a bad custom to demand a certain sum of a vessel
 passing through the river by the wharf, and not unloading
 there, for this vessel has no benefit from the wharf. But this
 tax may be reasonable if the town or city be obliged to cleanse
 the river, or do any thing beneficial to the vessel in passing
 the river.

1 Com D.
 292.—9 Co.
 58, case of
 Aldred. See
 Nuisance, An-
 tient Lights,
 and Air.—
 3 Cruise 535.
 —Co. Lit.
 15. a.

§ 4. So a custom, that one may build on a new foundation
 to obstruct antient lights is bad and void; for one custom is
 as old as the other. For when a man has a lawful easement
 or profit by prescription, time out of mind, another custom
 time out of mind cannot take it away; for one is as antient as
 the other. As if A have a way by prescription over B's land,
 B cannot prescribe to stop it. No prescription to a thing, the
 beginning whereof is proved by records, writings, or witnesses.

2 T. R. 768,
 Silby v. Ro-
 binson.

So a custom for poor and indigent householders living in A,
 to cut and carry away the rotten boughs and branches in a
 chase in A is bad. For the description of persons entitled is
 too vague and uncertain, and a verdict found for a deft. under
 such a custom was held bad and set aside, and one entered
 for the plt. and nominal damages. The claim was for neces-
 sary fuel to be used in their houses in A.

2 W. Bl 926,
 Bean v.
 Bloom, at
 large, post.

§ 5. It is a bad custom for inhabitants to claim a right in
alieno solo, as a right to cut and carry away rushes. (This is
aprendre.) The same case, 3 Wils. 456, 461, more fully
 reported; but 3 Wils. 332, contra; so 3 Salk. 279. But
 Bean &c. is the last decision.

Cro. El. 362,
 Fowler v.
 Dale.

§ 6. A grant of common to inhabitants is too vague and is void.
 So it is too vague for an inhabitant to purchase to him and his

successor ; but an easement may be granted to inhabitants ; as it is a good custom they have a way, &c.

CH. 26.

Art. 4.

§ 7. A custom, that a man who signs a note, promising to pay money to another or his order, shall be obliged to pay it, is a void custom. A natural person cannot prescribe, except in right of a permanent estate ; inhabitants, as such, cannot purchase or have a right in another's soil by custom, but for a special reason.

1 Salk. 129.—
2 Ld. Raym.
729, Potter v.
Pearson.—
1 Ld. Raym.
485, Wickly
v. Wildman.
1 T. R. 616,
Seward v.
Baker —
2 Wils. 95,
Mayor of Ex-
eter v. Wim-
bet.—3 Burr.
1402, Mayor
of Yarmouth
v. Eaton.—
Doug. 722.—
3 Burr. 1717.
—Esp 8.—
Salk. 248,
Venhistone v.
Elden.—
Register 100.

ART. 4. Remedies on customs.

§ 1. Wherever a custom is good, and monies thereby become due to one as tolls, wharfage, fines, port duties, &c. he may recover them in an action of *assumpsit*, unless it be a part of the custom that he apply some other remedy exclusively. So whenever a custom is bad, and one receives money by pretence of it, he may be compelled to repay them in this action of *assumpsit* for monies had and received. In most of the cases a general *indebitatus assumpsit* lies. But it may be a part of the custom, that the party entitled to the duty may distrain for it, and if it be a port duty, as 5s. a chaldron on all coals exported, even the sails and anchors of the vessel may be distrained for it. And this other remedy is often *cumulative* only, and does not generally take away the remedy by *assumpsit*.

§ 2. Customs which are consistent may be pleaded against each other. And the party pleading the general custom need not shew its modification, which is consistent with the right he claims. As where a custom is pleaded to put swine on a common, the plt. may reply they must be *rung*, without traversing the custom set up in the plea, for these customs are consistent. So one custom may be to *tow*, and another to pay for it.

3 T. R. 264,
per Buller J.
1 Wils. 253,
Kenchin v.
Knight.

§ 3. In this case the court resolved, that if one be bound to repair a wall against the sea, and he keeps it in good repair to such a height, and as sufficient as customary ; and by a sudden flood or flux of fresh or salt water it be broken down &c., he is not liable ; but it must be repaired by the commissioners of sewers at the expense of all benefited by it, according to their interests, for this sudden breaking down &c. is by the act of God, or inevitable accident, and not by any fault in the deft. But otherwise, if there had been any fault in him, and if by his fault, each one injured may sue him. This action was case.

10 Co 139,
Kughtey's
case.

§ 4. In this case it was decided, that the public has a right to use cranes erected on public quays. And one in trespass justifying the use of a crane on a public wharf need only say, that it is " a public open and lawful wharf " and need not claim the right, time out of mind.

8 T. R. 606,
Bott v. Sten-
nett.

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§ 5. Chancery upon a bill will direct a trial at law of a custom or prescription to avoid a multiplicity of suits; and issue may be directed to try whether such customs as laid in a bill, or any or what custom, though the plt. does not prove the custom laid. 2 Com. D. 441; 1 Vern. 22, 266; Bunb. 43.

Cro. El. 664,
Feneux v.
Hovenden.

In this case the court decided, that the inhabitants of Southwark had a watering place in *alieno solo*, and if disturbed each had his action. The remedy was different in Manning's case above.

2 W. Bl. 923.

How "*occupiers of lands may by custom claim a right in alieno solo*," but inhabitants cannot; though before in Rackham v. Jesup it was held they might so claim. This last decision must prevail.

3 Wils. 456,
Beau or Bean
v. Bloom.
The same
case 2 W.
Bl. 926.
Note, this
was case
for a tort
against a
wrong doer.
3 Wils. 426.

§ 6. This was case for disturbing the plt. in his right of common, and right to cut and take rushes upon the common for litter for his cattle by antient custom. The plt. declared, that July 1, 1772, and for two years past, he was and hitherto hath been, and still is lawfully possessed of, and is the occupier of, a messuage and ten acres of land with the appurtenances in the parish of Ludham; and all that time entitled to common of pasture on the waste in Ludham, containing about 500 acres, for all his commonable cattle *levant* and *couchant* upon his said messuage and land &c. every year, and all the year as appertaining to his said messuage &c.; that time out of mind there had been an antient custom, "that every occupier of land and tenements in the said parish of Ludham, who is entitled to have such common of pasture" in said waste, "hath used and been accustomed to mow and cut down rushes growing and being in and upon said waste or common every year;" during the summer quarter &c., to place the same in heaps &c. on said waste &c., to dry &c., take away &c. "for litter for the cattle, so *levant* and *couchant* as aforesaid, of every such occupier of lands and tenements in the parish of Ludham aforesaid, who is entitled to have such common of pasture aforesaid." Yet the deft. knowing &c., contriving &c., cut and carried away ten acres of said rushes &c. whereby the plt. could not use his said common and said right of mowing &c. &c. in so ample a manner as he ought &c. Plea, not guilty, and verdict for the plts. Deft. moved in arrest of judgment; because "a custom to take a profit in the soil of another is bad;" cited Gateward's case. The plt. replied, that Gateward's case did "not prove that an occupier of land may not have common in the soil of another, and by custom have a right to cut down and take rushes for litter for his cattle *levant* and *couchant* on his land;" cited 3 Lev. 160, Taylor's case, in which it was decided freemen of Lynn being

owners and masters of vessels may by custom dig ballast &c. This objection was overruled ; and 2 W. Bl. 928 the court said, the privilege claimed is by custom, not prescription. "The same rights may be claimed either way ; one is local, the other personal ; and the difference lies in the mode of claiming suited to the difference of the claimants. Where the claimant has a weak and temporary estate, he cannot claim in his own right, but must have recourse either to the place and allege a custom there, or if he prescribe in *que* estate it must be under cover of the tenant in fee." "So occupiers of houses may set up a custom to cut turves," though "inhabitants cannot."

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If one allege a custom in a town, it is sufficient to say an *ancient ville*. This is consistent with a usage time out of mind. So what is tantamount is sufficient, Com. D. Pl. C. 38.

10 Co. 59.—
3 Mod. 50.

Where common is claimed by a corporation it is as well to plead, that every burgess shall have common, as to plead that the corporation shall have it for themselves and every burgess ; and the principle will hold in regard to any local custom where the members of a corporation claim a benefit in its right.

1 Saund. 339.
—6 Com. D.
84.—2 Lev.
253.

In this case in trespass *quare clausum fregit*, the deft. alleged a custom ancient and laudable, used and approved of in the parish of —, for all the inhabitants for the time being of said parish to have &c., so stated the custom. Then averred, that at the several times when &c. he was an inhabitant of said parish, and at those times he entered the *locus in quo*, and played at cricket &c., and held good. The deft. alleged a local custom for the inhabitants of a parish to do so and so, that he was one of them, and stated his acts to be according to and within the custom. This seems to be the true way of pleading. Plt. traversed the custom.

2 H Bl. 393,
399, Fitch v.
Rawlings.—
1 Lev. 176.

§ 7. If one claim by custom or prescription, he must prescribe, and the plt. in his declaration must shew a good custom, as in case for not keeping a bull in a parish, he must shew a custom or prescription to keep one ; so a loss for want of one must be alleged.

5 Com. D. Pl.
O. 38.—
4 Mod. 241,
Waples v.
Basset.

§ 8. It is a general rule, that whenever the party avows and justifies a distress for a thing against common right, a custom must be alleged to distrain in such case.

1 Salk. 175,
Fletcher v.
Ingram.

§ 9. But it is enough the party avowing be bound to perform what is the consideration for the duty he claims ; as if a borough be bound to repair a port, and is entitled to toll in a suit or distress for the toll, it need not be alleged the port is in repair ; for it is sufficient the borough is bound to repair ; for being bound by the custom to repair is the consideration. 2. The master of the vessel as to port duties is the exporter. Whoever claims an easement must plead it specially, as he claims a right in another's soil.

Venhistone v.
Elden,
above.

2 Wils. 176,
Hawkins v.
Wallis.

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Common-
wealth v.
Manning,
Mass. S. J.
Court, June
1796.

ART. 5. Cases in the United States. In this case there had been a custom, time whereof &c. in the town of Ipswich, for all the inhabitants of that town to water their cattle, teams, &c. at a certain watering place in Ipswich river, which there run along side of the highway, and the deft. erected a building that covered a part of this watering place; and he in one count in the indictment was indicted for a nuisance to this watering place of all the inhabitants of said town, and held good; for they may have, time out of mind, such an easement; and if obstructed, the obstruction may be considered as a nuisance, and indicted accordingly, and the inhabitants shall not be confined to their civil actions.

Customs and usages at banks, see *Jones v. Fales*, and the *Lincoln and Kennebeck Bank v. Page*, Ch. 29, a. 10.

10 Mass. R.
26, *Homer v.*
Dorr.

§ 2. *No class of citizens can establish a custom contrary to law*: though this custom may be useful to explain the intentions of the parties to contracts. As where an insurance was made "on a cargo from Boston to Archangel and back to Boston." No property was returned in the ship, in which case it was proved to be the universal custom in Boston where this insurance was effected, to return a portion of the premium. It was known the decisions of the court had been otherwise. Held, first, on the point the law is well settled and generally understood: 2. "Evidence of custom and usage is useful in many cases to explain the intent of parties to a contract. But the usage of no class of citizens can be sustained in opposition to the principles of law." Judgment for the plt. for the whole premium.

2 Johns. R.
357, *Cortely-
ou v. Van*
Brundt.

§ 3. Held, that prescription does not give the right of erecting a building on the land of another person; for title to lands must be by matter of record &c. A usage to erect huts on the shore to carry on a fishery must be pleaded or be in the notice.

11 Mass. R.
533, *Cook v.*
Stearns.

§ 4. A right to enter on another's land to repair a dam &c. necessary to work a mill can exist but by grant or prescriptive right, though the dam and embankment were originally erected with the consent of the owner of the soil. The deft's. claim was stated in a special plea to which the plt. demurred for cause; 1. no legal conveyance pleaded &c.; 2. no prescriptive right shewn, nor is the mill described as ancient. But held, the deft. claimed a permanent interest in the plt's. land to keep up an embankment there, which cannot by our statute of 1783, Ch. 37, pass without deed or writing, and if intended to continue seven years, it must be by deed acknowledged and recorded. A license to do an act on another's land, as to hunt or cut a tree, may be by parol, where it passes no estate

in the land, and such a license is revocable when executory, unless a definite term is fixed, but irrevocable when executed. CH. 26.
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In England a custom, to be general and common law, must extend throughout the realm; here throughout a state. But the judges in both, and not the jury, must decide if there be such general custom or not. Dr. & Stud.
18.

Several cases of prescription. Trespass in the plt's. close. Plea, Clode was seized of massuage and lands in Upottery; and that "he and all those whose estate he had &c. for the time being, had sued, and have been accustomed to have and use, and still of right ought to have and use" common of pasture in the place where, for all commonable cattle *levant and couchant*, and justified, and the other defts. as his servants; plt. traversed the right of common, and issue. Plt. went through his evidence. Then the deft. opened two ancient grants without dates, which, as the judge observed, were inconsistent with plea. Verdict for the plt. Deft. moved for a new trial; 1. because his title was not laid by way of prescription, but only of usage; to this answered, that those who prescribe in a *que estate* need not use the words, time whereof the memory &c., but mere usage in all those whose estate the party hath, will imply the same thing: 2. Because the grant might be in confirmation of the prescriptive right and then consistent. Held, these grants might be before the time of memory, or so in confirmation of the prior prescriptive right. Matter to be left to the jury. New trial granted. 2 W. Bl. 989,
Addington v.
Clode & al.
But prescrip-
tion in no
case can give
title to land,
or to build on
it.—2 Johns.
R. 362.—Co.
Lit. 113.—
2 Bl. Com.
263, 264, is
confined to
a corporeal
heredita-
ment.—Clark
v. King, 1 Ld.
Raym. 266.

§ 5. A lessee for years cannot prescribe in his own name. Such a prescription is bad after verdict. In a possessory action for an injury to an easement the plt. need not state his title, unless the deft. appears to be tenant of the land; but if the plt. offers to do it and states an insufficient title, it is bad. A termor cannot be charged in a *que estate* with an immemorial obligation. Dorney &
Cashford.

§ 6. Replevin for taking six boat-oars at — deft. avowed the taking *damage feasant* in his soil and freehold, bar, a prescriptive right to fish in the sea, use boats &c., and land &c. at this place. On demurrer held, that the right of fishing in the sea is common to all the king's subjects: hence, a prescription for such a right as annexed to certain tenements is bad, and such a prescription is void. And generally, "a man shall not prescribe in that which the law of common right gives." "Now every man may fish in the sea of common right," as he may pass in the highway. Also held, 2. a prescriptive right claimed in respect of certain ancient tenements &c. without saying how many, is bad. 3. If a man have a prescriptive right in respect of one tenement and ten acres, and another in respect of another tenement and ten acres, he Willes 265,
Ward v. Cres-
well, cites
Noy 20.—
6 Mod. 63.—
Salk. 357.—
1 Mod. 106.

But see Pot-
ter v. North,
post, and
Beau v.
Bloom, ante.

CH 26. must make two several titles implied, and cannot blend them
 Art. 5. as one title. *Prescription* for common for four cows is good
 for one cow, 3 Salk. 279.

Loft 76,
 Rex v. Johns

6 D. & E. 748,
 Peppin v.
 Shake-
 spear & al.

Where a grant may be presumed after fifty years, see Ch. 79, a. 3, Mayor & al. v. Horner; prescription cannot be made where the creation of the thing in which it is claimed is within the time of memory.

§ 7. Trespass in the plt's. close and breaking down his fence &c. Plea, the *locus in quo* was formerly part of Sharp Thom common, and so pleaded a right to enter the common to dig and carry away sand and gravel for the repairs of a house. Held, the plt. must allege the house was out of repair: 2. That he entered the place for the purpose of digging for and carrying away sand and gravel for the necessary repairs of that house: And 3, that the same sand and gravel were used for that purpose. Def't. pleaded six different pleas, stating different prescriptive rights.

2 Inst. 653.—
 6 Com. D. 78.
 —2 Roll. 269.

§ 8. Prescription must be pleaded time out of mind, though limited to years; as for things ecclesiastical, though by canon law limited to forty years. But all time before Richard I, is time out of mind, on an equitable construction of the statute W. II, which limits it for a writ of right where a grant may be presumed.

1 D. & E. 667.

§ 9. Every prescription is good, if by any possibility it can be supposed to have had a legal commencement.

§ 10. The same seven rules stated in art. 1, as to custom, apply as to prescription, except prescription must have a legal beginning.

4 Co. 88.—
 1 Lev. 237.—
 6 Com. D. 80.

§ 11. A prescription, that a great part of a river runs &c., it is good; for it is not necessary to shew how much; so as much *estovers* as a man can dig in one day, as appurtenant to his house, is sufficient. Varying the thing does not destroy the prescription; see Mills &c.

2 Rol. 266.—
 2 Cro. 491.—
 2 Cro. 446.—
 Co. Lit. 116,
 a.

As every prescription must be reasonable; a sheriff, for instance, cannot prescribe for taking gifts for doing his office. So one cannot prescribe to do a wrong or nuisance, as to erect a dove-cote, or to lay or continue logs or wood in the highway. Nor against a statute, except the prescription be preserved by another statute, or except it be only declaratory of the common law or only affirmative.

2 Mod. 104,
 Hickman v.
 Thorne & al.

§ 12. One may prescribe for a thing that qualifies another prescription; as if A prescribes for common, B may prescribe to enclose when he has lands lying there together, and plead accordingly.

Stra. 1224.

§ 13. If any part of a custom as laid is unreasonable, the whole is void.

If one prescribe for a certain number of cattle, he need not state they were *levant and couchant*, because it is no prejudice to the owner of the soil, the number being ascertained; otherwise, if the number be uncertain. 2 Esp. 26, Richards v. Squib.

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§ 14. In the time of queen Elizabeth, common was often claimed by reason of inhabitancy; but in Fowler v. Dale it was disallowed. And the court said, if allowed, it would follow the person, and for no certain time or estate. Cro. El. 362, 363.—2 Esp. 27.

§ 15. *Replevin* for taking the plt's. cattle; "avowry that Burnell was seized in fee and in possession of a certain antient messuage: and that Ingham was tenant and occupier of another ancient messuage so, prescribed for common in the *locus in quo* (for themselves "and all other occupiers of said messuages") and avowed taking *damage feasant*. Plt. traversed the right of common and issue, and verdict for the defts. Plt. moved in arrest of judgment, and said the avowry was ill. "The prescription for right of common being confined to the occupiers of the messuages who have but a mere temporary, and not permanent interest therein," cited 22 E. IV, 17, Gateward's case, 3 & 4 resolutions; and Hunt v. Beaucham, 33 Geo. II; where in trespass the "plea was that every inhabitant of the parish residing and dwelling in the parish, and being an occupier of an ancient messuage had a right of common" &c. Held, a bad prescription. So bad, to plead all the occupiers of a close, time out of mind, had used to repair the fences, Cro. El. 445, Anstye v. Fawkner; as *occupiers* is too general. So "a prescription, that possessors ought to repair fences" is a bad one; 2 Rol. R. 288; Palmer 331; Cro. Jam. 665. And though this avowry might be good as to Burnell, who was seized in fee, yet it was bad as to Ingham who avowed as occupier. The defts. said, if the plt. complained of an injury done to his soil, the deft. in his justification must prescribe in *que estate*; but in trespass for taking goods, it is sufficient for the deft. to plead he was possessed of the *locus in quo*, and the goods were *damage feasant*. The same for taking cattle *damage feasant*, where the deft. has common; and no difference between trespass and replevin for taking cattle only. The court admitted this reasoning of the deft. to be good in trespass, no title being in question; but said, "the right of common was laid in the occupiers only, and held it was necessary for the deft. in replevin to shew a title; for "in replevin the avowant must justify and shew by what authority he distrains." "There is a great difference between replevin and trespass, because the avowant being to have a return of the cattle must shew a title in *omnibus*; otherwise, in trespass in which the deft. need only plead an excuse," (2 Lutw.

2 Wils. 258, 261, English v. Burnell & Ingham.

See Cro. El. 885.—2 Esp. 81, 32.—Salt. 107.

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1231.) "The avowant must allege what estate he is seized of, therefore this avowry is bad," and the verdict has not cured it, as the defts. have stated a defective title, and not merely shewn a title defectively stated.

Cro. El. 722,
Bushword v.
Pond, or
Bond.—
2 Esp. 29.—
Bul. N. P. 69,
cited Phil.
Evid. 163.—
1 Taun. 642.

§ 16. If the party has a general common, that is, for all kinds of cattle, he may well prescribe for common for any particular sort; for this comes within the general prescription. As where the party prescribed for common for 100 sheep, and proved 100 sheep and six cows. This was well; but otherwise, if he lay one prescriptive right and proves another; as if he claims common for 100 sheep and proves common for 120. In this case he fails in proving the prescriptive right he claims.

§ 17. Though it is a general rule the party must state his prescriptive right fully and as it exists, as it is entire; and though this right like every right must be proved as laid, yet this does not mean in every minute circumstance; and therefore the prescription alleged and that proved, may vary or differ as to the quantity of land to which it extends or to which it is appurtenant.

Cro. El. 532,
Gregory v.
Hill.

§ 18. As where A prescribed to have common to his messuage and twenty acres of land, and in evidence he proved but eighteen acres. Held, this evidence proved the prescription laid.

Hob. 64,
Johnson v.
Thorough-
good.

§ 19. So if the party lay his prescription not so large, and prove it more ample than he has laid it, he does not fail, if the nature of it is the same, as where the prescription was to tether horses from and after a certain day named, yearly; and he proved his prescriptive right to be on that day, also the day before it, and on a certain Monday, and afterwards during the year at pleasure.

Bul. N. P. 69,
60.

§ 20. But as in *Pring v. Henly*, if the deft. avow taking damage feasant, and the plt. prescribe for common for all commonable cattle, and prove common for sheep and horses only, he fails; for here he claims one kind of common, as for commonable cattle, and proves another as for sheep and horses. But otherwise, as above, if he had prescribed for a common for any particular sort of cattle, and proved his right to a general common, as the common proved would include that claimed. So if a man prescribe for common appendant to 300 acres in four towns, and proves it appendant to two hundred acres in two towns only, his evidence does not prove his prescription.

5 Co. 109.—
9 Co. 24, 25,
Foxly's case.
—Bul. N. P.
212.

§ 21. It is laid down in this case as a general rule, that whatever may be gained by usage without matter of record, may be claimed by prescription, such as ways, estrays, treasure-trove, wreck of the sea, &c. but such things as are not

forfeited but by matter of record, as felon's goods, cannot be prescribed for.

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§ 22. And in cases of prescription it is allowable to give hearsay evidence in order to prove general reputation; as where the issue was of a right of way over the plt's. close, deft's. were allowed to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed.

Bul. N. P.
295.

§ 23. *How the thing to which the prescriptive right belongs may be altered, without losing it.* And generally the owner of the thing may alter it as suits, if he do not prejudice him against whom this right is claimed. As where the owner of fulling mills prescribed for a stream or a great part of it through one's land, as running to and turning his said mills, he may convert them into grist mills. This does not destroy the prescription. So where a tenant is bound to cover his lord's hall and it falls, and the lord builds a new one in the same place and of the same bigness, the tenant is bound to cover it; but not if of greater length or breadth or in another place, or if it be converted into a cow-house, stable, kitchen, &c.; for in such case the lord by his own act cannot alter the nature of the tenure, nor of the service the tenant is bound to perform. So if one has *estovers* by grant or prescription to his house, though he alters the rooms or chambers of his house, as to turn a hall into a parlour, and such alterations of the quality, and not of the house itself, and without making new chimneys, by which no prejudice accrues to the owner of the wood, it is no destruction of the prescription. So "if he builds new chimneys or makes a new addition to his old house, by that he shall not lose his prescription, but he cannot employ or spend any of his *estovers* in the new chimneys, or in the part newly added; the same law of conduits and of water pipes," &c. So a corporation loses not its franchises by a change of its name, for no one is prejudiced thereby.

4 Co 86, 88,
Luttrell's
case. See
Mills, &c.

§ 24. Replevin for taking corn, Sept. 20, 1784, at Peterchurch. In the avowry and cognizance a special case was stated, bar &c. And held by the court, that a custom that a tenant may leave his away-going crop in the barns &c. of the farm for a certain time after the lease is expired and he has quitted the premises, is a good custom.

1 H. Bl. 5, 9,
Beavan v.
Delahay &
Lewis.

§ 25. *Custom, how uncertain.* Replevin for a cow. The deft's. third plea; a cognizance as bailiff of R. S. to whom he had underlet the *locus in quo*. The plt. pleaded in bar to this avowry, that said field, containing 100 acres whereof said place in which &c. was parcel, time out of mind, of right hath been and ought to have been, and still of right ought to have been, open and common in manner following, "that is to say,

2 Bos. & P.
257, De
Costa v.
Clarke.

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open every three years, that is to say, on or before the 15th day of October, when the corn was cut and carried off the same for a long time, to wit, for three weeks and upwards :” that before said time when &c. one J. B. was seized in fee of a messuage and two acres of land with the appurtenances in — “ and that he and all those whose estate he had and hath in the said messuage and land, with the appurtenances for the time being from time whereof &c. have used and been accustomed to have, and of right ought to have for themselves and their tenants, occupiers of said messuage and land with the appurtenances common of pasture for all their commonable cows *levant and couchant* on said messuage and land, with the appurtenances in the said field, of which the said place in which &c. is parcel, every third year when the same is open, and not sown and cultivated in the manner aforesaid, as to the said messuage and land with the appurtenances appertaining, that the said J. B. demised to the plt. from year to year ; that in virtue of the said demise the plt. became possessed of the said messuage and lands with the appurtenances, and being so possessed before the said time when &c. put the said cow, being his commonable cow, *levant and couchant*, on his said messuage and land with the appurtenances, into the said field, to use his common of pasture there as it was lawful for him to do, the same time, from thence until and at the taking of the same as aforesaid, being when the said field was, and ought to be open and common as aforesaid : that the said cow was in the said field in which &c. parcel &c., until the deft. of his own wrong &c. and this &c. wherefore &c.” And the pleadings were continued to a rejoinder and issue. Verdict for the plt. ; on motion &c. for a rule &c. Held, this custom as pleaded was uncertain and bad, both as to its commencement and duration. Commencement uncertain on or before the 15th of October, since the corn might not be cut and carried off before that day ; but the clear uncertainty was in the words *three weeks and upwards*, and for any thing that appeared the cow might have been put in after the three weeks expired ; possibly had it been alleged she was put in within the three weeks, the court after verdict would have supported this prescription, and the time under the words *and upwards* is wholly uncertain, and though these words be under a *videlicet*, they cannot be struck out.

1 Saund. 351,
364, Potter v.
North.

§ 26. In this case the party claiming a prescriptive right of common in a certain 100 acres, admitted in his plea the other party was seized in fee thereof ; but added, he the plt. was seized of an ancient messuage with the appurtenances, in — being one of the freehold tenements &c. “ And that there are and from time whereof &c. were divers ancient mes-

suages" &c. Then the plt. laid a prescription, that the several tenants of these messuages being seized thereof in their demesne as of fee, and all those whose estates they severally have in the same, for all the time aforesaid, have had the sole &c. pasture of said 100 acres for all their cattle &c. But the number of tenements or messuages was not stated, but only "*divers ancient messuages*," and held well.

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Art. 6.

ART. 6. *Pleadings in prescriptions.*

§ 1. Every one who pleads a prescription ought to allege it in him who has the inheritance, as to say he is seized in fee, and he and his ancestors, or he and those whose estate he has, or that a corporation and their predecessors &c. have had or used &c. Co. Lit. 118.

§ 2. All prescriptions are in their nature entire; and when they are pleaded, the adverse party cannot deny a part only, but he must either demur or traverse the whole, and therefore if the deft. plead a prescription, and fail in proving any part of it in evidence he must fail in the whole. 4 D. & E. 167, Morewood & Wood.

§ 3. After verdict, it is well if a thing be alleged by way of prescription where it ought to be by custom. And if a custom be only inducement to an action, it is sufficient to be alleged *quod solet*, without saying *solet et debet* &c. And a plea of prescription for common in a *que* estate is good after verdict, though it be not in express terms alleged that the owners of the estate have used it time immemorial. It states a right of common in all those who held the estate, and unless a prescriptive right had been proved, the plt. could not have obtained a verdict. Not stated in the plea they immemorially held the estate. 1 Lev. 177.

§ 5. A custom that inhabitants or residents shall have profit in another's soil is merely void, unless as part of an easement, as gravel to repair a way, &c. 6 Co. 60, 61.

Trespass in the plt's. close with cattle, horses, &c. with continuance; as to the hogs, deft. pleaded not guilty, and as to the residue, that the vill of Stixwold was an ancient vill and laying contiguous to said close, that within the said vill there is, and time out of mind has been, a custom, viz: "that the inhabitants within the said vill of Stixwold within any ancient messuage there by reason of their commorancy and residence in the same, had and were used and accustomed to have common of pasture in the said place, in which &c. for all and all kind of oxen, horses, and other large beasts, &c. &c., and also pleaded, that at said time &c. he was and *adhuc est commorans et inhabitans* in said town of Stixwold, and in an ancient house in Stixwold aforesaid, and so justified. Plt. demurred: resolved first, only four kinds of common appendant, appurte-

Gateward's case.

CH. 26. nant, in gross and by reason of vicinage, and that this common
Art. 6. by reason of *commorancy* and *residence* is none of them.

§ 6. Second. As he had no estate or interest in the house &c., but only "a mere habitation and dwelling," he could have no interest in the common in respect of the house.—This is the only point stated by Croke to have been formally decided by the court, and certainly this point was clear and alone sufficient for the decision of the cause; and as to the other decisions stated by Lord Coke as having been made, they were his own, or if made by the judges, they were not necessary to the decision of the case.

§ 7. Third. Such common will be transitory and uncertain, "for it will follow the person, and for no certain time and estate, but during his habitation." This kind of interest the law does not allow; for a custom must be certain and have continuance &c.

§ 8. Fourth. Against the nature of common, "for every common may be suspended or extinguished, but such a common will be so incident to the person that no person certain can extinguish it, but as soon as he that releases &c. removes, the new inhabitant shall have it."

§ 9. Fifth. "He who claims it as an inhabitant can have no action for it."

Sixth. "In these words, *inhabitants* and *residents*, are included tenants in fee simple, tenants for life, for years, by *elegit*, &c. tenant at will &c., and he who hath no interest but only his habitation and dwelling." "And clearly, tenant in fee simple ought to prescribe in his own name; tenant for life, years, by *elegit*, &c., and at will &c. in the name of him who hath the fee, and by good pleading may enjoy &c."

§ 10. Seventh. No improvement can be made &c. states the difference between a profit to be taken in *alieno solo*, and an easement in it. As to a way, this every inhabitant may have, but not such profit. And a way or passage may well follow the person.

Eighth. As to copy holds. And every prescription ought to have a *lawful* beginning; but a custom, a *reasonable* one only, as gavelkind. This may be reasonable but cannot be intended to have a lawful beginning, "by no grant or act, or agreement, but only by parliament."

§ 11. Ninth. Held also, if the custom had been alleged, that *quilibet pater familias infra aliquod messuagium*, it would also be bad for the above causes.

There held, "inhabitants, unless incorporated, cannot prescribe to have profit in another's soil, but only in matters of easement," as in way &c. to church, market, &c. So in matters of discharge, as to be discharged of toll, or of tithes &c.;

but to have an interest in another's soil cannot be; "for that ought to be by persons enabled, who are always to have continuance; for if there should be such prescription, then if any of the inhabitants depart from their ancient houses, and the house continues empty, the inheritance of the common should be suspended, which cannot be,"—mentions the release as Coke does: added "and by such prescription a maid servant or child who resides in the house is said to be an inhabitant, and to have the benefit of the common;" this cannot be.

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Art. 6.

§ 12. So it is not good for every freeman of a corporation to prescribe for common, but he ought to prescribe in the corporation. Nor can one prescribe that A, tenant for life, and B in remainder ought to have common.

6 Com. D. 83.
—2 Jones
115.—Cro.
El. 154.

§ 13. To say that every burgess ought to have common, is as well as that the corporation shall have it for them and every burgess. In either case the right is in the corporation.

6 Com. D.
84.—2 Lev.
253.

§ 14. If the plt. alleges he was seized, and then prescribes, it is bad, if not stated seized in fee, for if not seized in fee he cannot prescribe, and seisin in fee will not be intended even after verdict. And a prescription cannot be annexed to any thing but an estate in fee, as prescription itself is in fee in all cases.

2 Mod. 318,
Scoble v.
Skilton.

§ 15. In this case the court said, "the word *solet* implies antiquity, and will amount to a prescription, and *solitus cursus aquæ* running to a mill makes the mill to be ancient; for if it be newly erected, there cannot be *solitus cursus aquæ* towards the mill.

3 Mod. 48,
52, Hebble-
thwait v. Pal-
mer.

§ 16. Special action on the case was brought against the deft. for not keeping a bull and a boar; and on demurrer to the declaration, held it was bad; because, first, it did not state the deft. was obliged to keep them by custom, prescription, or otherwise. 2. Did not allege any particular loss or damage by the cattle not increasing. And third, the deft. being rector of the church ought to find a boar in consideration of paying of him tithes.

4 Mod. 241,
Waples v.
Basset.

§ 17. It is a general rule, that customs are not to be enlarged beyond the usage; because it is the usage and practice that makes the law in such case, and not the reason of the thing.

11 Mod. 160.

1 Bac. Abr.
678.

In an action brought on a custom it must shew what that custom is, otherwise it is not maintainable.

2 Ld. Raym.
1134, 1135.

§ 18. He who pleads a prescription must state the whole of it; see *Lovelace v. Reynolds*, Ch. 91, a. 7, and prove it as he lays it, 2 Esp. 27.

But where any collateral matter is connected with the prescription, but makes no part of it, it need not be stated; as in *Waring v. Griffith*, stated Ch. 71, a. 2, where the payment

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2 Esp. 449,
Margatroid
v. Law.

of the 2s. for every one buried in the church was merely collateral and no part of the prescription. And as to what evidence proves the prescription as laid, see *Pring v. Henly*, Ch. 91, a. 7, Evidence.

§ 19. If either party in an action prescribe for an easement, the other party cannot state a contrary prescription without a traverse of that set up by the other. As where an action was brought against the deft. for diverting a water course. He pleaded he was seized of two closes, through which the water ran, and that he and all those whose estate he had, used to water their cattle there in said water; "but that for convenience of watering they had a right to dig a ditch near the said water course," and so concluded without a traverse, this being a prescription varying the first, was held to be bad without a traverse.

Cro. Car. 432,
Spooners v.
Day & Ma-
son.

§ 20. This was error brought in an action of the case. "Whereas Robert Fuller was seized in fee of the manor of Thompson, and he and his ancestors &c. time whereof &c. had a fold for his and their sheep, not exceeding 300, in seventy acres of land in Thompson every year from fourteen days after the corn was carried away, to continue until our Lady within the lands not sown again. The plt. then stated, that Robert Fuller let by deed to the plt. seventy-five acres, parcel of said manor, with the fold course for five years, and that the defts. enclosed, and thereby disturbed the plt. of his fold course." And one of the defts. pleaded not guilty; the other in bar, "that there is a custom within the said vill, that any one may inclose any part of his lands lying in common fields, and therefore he enclosed this land lying in the common field." Plt. demurred, and held this bar was bad, because it did not traverse the prescription in the declaration. And one "cannot plead a prescription against a prescription;" but the deft. ought to have answered that stated in the declaration.

Comyns' R.
603, and 366.

Customs or prescriptions are only triable at common law; held in prohibition.

After verdict it is presumed a good prescription was proved, though not expressly alleged. This is not according to the best rules in pleading.

§ 21. The matter of this chapter is also much considered in other chapters, as in regard to Disturbance, Ch. 64; Fences, Ch. 66; Ferries, Ch. 67; Fisheries, Flats, and Rivers, Ch. 68. As to Lands, Ancient Lights, &c. Ch. 69; Mills, Lands flowed, Mill Streams, Water Courses, and Watering Places, Ch. 71; Nuisances, Ch. 74; some cases of Toll, Ch. 76; and in Trover, Ch. 77; Ways, Ch. 79; several cases in Replevin, Ch. 171; several cases in Trespass, Ch. 172, 173. So in chapters as to Pleadings &c. &c.

§ 22. On the whole, after the many varying decisions it must now be considered as settled law, that inhabitants (not a corporation) cannot claim a profit *a prendre in alieno solo*, nor can occupiers of certain messuages or tenements, except when they can claim on possession only, as in *Bean v. Bloom & al.*, and as to this principle the English cases as to common of pasture, of *turbiary*, of *estovers*, &c. are good authorities in the United States, where one claims a right in another's soil, as to dig ballast, sand, muscle bed, manure, clay, as to glean, &c. &c. The principles as to this right and an easement, as to true distinctions between custom and prescription, being the same in both countries.

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CHAPTER XXVII.

DAYS, DATES, MONTHS, CALENDAR, &c. COMPUTATION OF TIME IN SUNDRY CASES.

IN most legal proceedings &c. the exact computation of time, as of days and dates &c. is often material; and it is frequently a nice question when in point of time the plt. may sue, and when he is barred by the acts of limitations. It is here intended only to shew the true measure or computation of time. By our law, day is from midnight to midnight. This manner of computing time we have derived from England.

2 Bl. Com.
141.

ART. 1. A rule is laid down in this case, to wit: "that where a computation is to be made from an act done, the day when the act was done was to be included." Therefore, by statute the debts. were to have one calendar month's notice before they were sued. They had notice April 28, 1788, and were sued May 28, 1788, and held well; for the 28th of April is to be computed as included in and a part of the month.

Dougl. 463,
Rex v. Ad-
derly.—3 T.
R. 623, 624,
Castle v. Bur-
ditt.—1 Ld.
Raym. 650.

§ 2. So a robbery committed Oct. 9, the year is out the next October the 8th day; for the day of the robbery is a part of the year, and there cannot be two ninth days in one year. By the same rule the day on which a writ is served is computed one of the 14 or 30; hence, one served on Tuesday is fourteen days before the Tuesday fortnight. This is the rule at common law. But some hold the law merchant to be different, and that it omits the day as the day of the date of a note or promise; as if it be dated the first of June, the second of June is computed the first day, but it comes to

Hob. 139,
Norris v.
Gawtry.—
Imp. M. P.
140.

Chitty on
Bills 205.—
5 Com. D. 81.

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Art. 2.



exactly the same thing in the end. As if a note or promise be dated June 1, payable in thirty days, it is payable and may be sued July 1, as stated in a former chapter. If the day of the date be omitted, then that of payment is reckoned one, and it is totally immaterial which is computed.

5 Co. 1 & 2,
Clayton's
case.—Salk.
625, How-
ard's case.—
2 Cro. 135.—
Hob. 14.

§ 3. So a lease dated before, but delivered June 20, for a year, ends June 19th; so the day of the delivery is one of the year, for the law allows no fractions of a day; *from henceforth* means from the delivery. So a lease to hold or promise to pay begins from the date of course, and the date includes the day of the date; and on this day the lessee may enter or bring ejectment; *Osborn v. Ryder*, Salk. 413.

3 Bl. Com.
Chris. Notes
1.—1 H. Bl.
14.

§ 4. So when goods are to be kept five days, of the days of taking and sale one is inclusive and the other exclusive, as where goods are distrained the first day of May, they may be sold the sixth.

3 Wood's
Con. 31.—
Salk. 625.—
2 Bl. Com.
141.—2 Ld.
Raym. 791.—
2 Salk 668.

§ 5. But where a lease is *from* the day of the date, or an interest passes *from* the day of the date, the day is excluded as the expression imports. So in Howard's case a policy on a life was dated Sept. 3, 1697, for one year from the day of the date, and it was held to begin Sept. 4, 1697, and to include Sept. 3, 1698. So one born Sept. 3 is of age Sept. 2, and it is said he may make his will on that day, as there is no division or fraction of a day.

Hob. 139,
Norris' case.
—Dyer 218.
—4 T. R. 121,
Bennet v.
Nichols.—
3 T. R. 642,
Lee v. Car-
lton.—1 Bl.
Com. Chris.
Notes 121.

§ 6. In some cases, however, the day of the date is excluded and is no part of the year &c., as in writs of protection, and in the enrolment of deeds in six months on the statute. So in putting in bail, judgment on Monday, four days includes all Friday, but if on Monday a party has four days allowed to plead in abatement, he must plead by Thursday night. So one born the first day of January and on the last hour of that day, is of age to act the first hour on the last day of December.

§ 7. By the annuity act the deed is to be registered in twenty days after the date of it. Held, one dated June 6th, and registered the 26th, is well registered.

2 Bl. Com.
140.

§ 8. A contract to deliver stock in six months in England, means *lunar* months, *Stra.* 446; but in Change Alley the same words mean *calendar* months, *Stra.* 652. In temporal cases time is computed by lunar months; in ecclesiastical by solar, *W. Bl.* 450.

Imp. 139,
140.—2 Cro.
117.

ART. 2. *In England a month is a lunar month of twenty-eight days, or a calendar month, of which twelve make a year.*

1 Esp. 186—
Salk. 625.—
Stra. 652.

§ 1. A month in law there is a lunar month; but a ship freighted by the month is a calendar month. So in paying money; so if money be lent for nine months, it must be understood calendar month. So as to bills and notes.

§ 2. In all statutes, pleadings, and in deeds, a month means a lunar month in England. But it is not generally so in the United States, especially in Massachusetts. Here when a month is expressed, a calendar month is usually understood. As when the party has "one month" to appeal from a probate decree; and the court said, "in this state, as well before as since the revolution, a month mentioned generally in any act had immemorially been considered as a calendar month." So as to bills and notes. A bankrupt's two months in prison &c. includes the day he is committed.

ART. 3. The *Calendar* or *Kalendar*. § 1. In the year 1750, the English parliament passed an act for correcting the calendar, which extended to all the king's dominions in Europe, Asia, Africa, and America, in order to make English time agree with that of most other countries which embraced the Christian religion. This act provided, that the old supputation by which the year began, March 25th, should not be used after the last day of December 1751, and that the first day of January next following the said last day of December should be deemed the first day of the year 1752, and so each year to begin January 1st; that the old months should be continued till the second day of September 1752, as they had been inclusive; and that the natural day next immediately after the said second day should be deemed the fourteenth day of September, then omitting the eleven intermediate nominal days; but this was not to affect private rights or the ages of persons. Otherwise the old calendar and leap year were preserved, except also finding that making every fourth year leap year or *bissextile*, made an error of eleven minutes a year, as explained below; to correct this nearly it was enacted, that the years 1800, 1900, 2100, 2200, 2300, or any other hundredth year after, except only every fourth hundredth year of which the year 2000 should be the first, should not be deemed leap year, but a common year of 365 days; and that the years 2000, 2400, 2800, and every fourth hundredth year after, and all other years before 1752 deemed leap years, should after 1752 be deemed leap years or *bissextile* of 366 days.

§ 2. This calendar is used in the United States, and though the best that has ever been made or adopted, it is not strictly right. It differs from true time thus: the true solar year, or the earth's annual revolution round the sun, is 365 days, five hours, and forty-nine minutes, eleven minutes less than 365 days, and one quarter of a day. Leap year or *bissextile* adds one day in every four years, making each year on an average 365 days, six hours, or $365\frac{1}{4}$ days. This is adding 11 minutes a year too much, and making the statute year 11

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Art. 3.

1 Com. D.
Anne.—6 T.
R. 224, La-
con r. Hoop-
er.—4 Mass.
R. 460, Avery
& al. r. Pix-
ley & al.—
3 Johns. Cas.
99.—3 East
467.

Julian peri-
od, 7980, is
composed of
19, the lunar
cycle, multi-
plied by 28,
the solar cy-
cle, and 16
the cycle of
indiction.

CH. 27. minutes longer than it should be, or longer than the solar year.

Art. 4. This alone between 1752 and 2400, makes a difference of 7128 minutes between statute and solar time. Towards correcting this error, the act in this period omits five leap years or *bissextile* days, containing 7200 minutes, that is, seventy-two minutes too much. There was this former error, and it arose thus: Julius Cæsar formed the Julian year by adding leap year every fourth year, making in each four years period, three years to consist of 365 days each, and one of 366 days, average year 365 days, six hours; that is, eleven minutes more than the true solar year. This eleven minutes from his time to the council of Nice, A. D. 325, amounted to a very considerable error, which at that council was set right. But from that time to the year 1752 they made 15,697 minutes; equal to ten days, twenty-one hours, and thirty-seven minutes; that is, the eleven days (nearly) omitted in Sept. 1752, were two hours, twenty-three minutes too much; making this statute year begin so much before the true solar year. The operation of this act is to omit after January 2400 three leap years, or three *bissextile* days, containing 4320 minutes in each 400 years. In that time the eleven minutes make 4400 minutes, eighty minutes more than the three omitted days, so that four statute centuries will be eighty minutes longer than four solar centuries. This too large deduction of two hours and twenty-three minutes, and of 72 minutes will be corrected by the operation of the eighty minutes in 1075 years, and solar and statute time will come together in the year 3475, and after that the solar will gain of the statute time twenty minutes in a century.

§ 3. A. D. 1582, Pope Gregory XIII. ordered, that once in 133 years a day should be taken out of the calendar, to wit: from the year 1600 every hundredth year was to be common, but every four hundredth was to be *bissextile*. This was called *new style*, which the English statute in substance adopted,

ART. 4. *Reasons for the lunar months.* § 1. As every one now almost thinks of the *calendar*, and not of the *lunar* month in speaking and writing, a question naturally arises, why if a statute speaks of a month simply, a lunar month of twenty-eight days is to be understood in any country recognising the calendar month. The truth is, it is the ancient law founded in reasons which have ceased to exist. The Greeks computed by lunar months; twelve of which made 354 days, eight hours, forty-eight minutes, and for the odd days, formed a *cycle* of nineteen years, each twelve months and seven intercalated moons; but these fell short of nineteen full years almost ninety minutes. The Romans and Northern nations

also calculated in many respects by moons, and a lunar revolution agreeing nearly with four weeks, that period was adopted as a month. This interpretation of a month was fixed in England &c. centuries before this country was settled; and the idea of a calendar month being familiar when it was settled, when a month was here mentioned, it came generally to be understood a calendar month; and so has been our construction of the expression, as above. The twelve months in the year are perfectly familiar to all, whereas a lunar month has for a long time been scarcely thought of in measuring time.

§ 2. The *Hegira* or *Mahometan Æra* began July 16, 622, and July 16, 1800, our Æra, should be July 16, 1178, in the Mahometan. But as the Mahometan year consists of twelve moons, that is, 354 days, eight hours, forty-eight minutes, it is ten days, twenty-one hours, and one minute shorter than the Christian or Julian year. Hence, a century in one calendar is very different from a century in the other.

§ 3. The Romans regulated their calendar three times; first, by Romulus: second, by Numa; and third by Julius Cæsar, as above. Romulus divided his year into ten months of unequal length, Mars or March the first month, Mars being the father of the state. Numa added January and February, but there was but little accuracy till Cæsar's time. Till his time the priests of superstition made the calculations; the months began on the first day of the moon. This was the calendar whence the Nones and Ides were reckoned. Calendar from *calo* to call the people together by an inferior priest to hear the regulated days of the month; Ides about the middle of it. Also the Jews regulated their passover partly by the moon; so Christians their Easter in commemoration of the resurrection of Christ. The passover was on the fourteenth day of the moon, which fourteenth day fell on the vernal equinox, or after it, as the moon happened to be. This equinox being fixed to be on the twenty-first of March at the council of Nice, held A. D. 325. While many of the Jews were Christians all kept their Easter on the day of the passover, and until about A. D. 190; but when the Jews generally abandoned Christianity, the Christians, except those of Asia, would no longer keep their Easter on the day of this Jewish festival, but postponed it to the Sunday next after. So now no Easter Sunday can be earlier than the twenty-second of March, nor later than April 25. The dispute began about Easter among Christians; hence A. D. 197, the bishop of Rome excommunicated those of Asia, because they would not adopt the said Sunday. Nor have Christians since been able to agree in calculating the precise times of the moon so as to agree in the time of Easter.

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Art. 4.

Avery & al.
v. Pixley & al.Kennett's
Roman Anti-
quities 86, &c.3 Frid. Conn.
247, 254.

CH. 27. The word *month* may mean lunar or calendar, according to the intention of the parties contracting. 1 Maule & Sel. R. 111, 118, Lang v. Gale.



2 Salk. 462.
—1 Cro. 14,
case of Drury.—12 Mod.
204, Pullen
v. Benson.

§ 4. A stranger to a deed is not held to state its precise date, Partridge v. Strange & al., Plowden 77 ; Dyer 74 S. C., and it is enough he state the substance of it.

ART. 5. *The day of the date how construed.* § 1. An impossible date is as no date, and the plt. must declare of the time of making the contract; and in said Drury's case it was held that the delivery of the deed is the true date, and not the one expressed in the deed ; for the deed takes effect from its delivery, and hence that is its date when it begins to operate.

Cowp. 714,
725, Pugh &
ux. v. Duke
of Leeds.—
Pow. on Pow.
433 to 541.—
1 Evans' view
of Ld. Mans-
field's deci-
sions 221 ;
and 3 D. & E.
623.

§ 2. When a power is given to A, in a marriage settlement, to lease lands for 21 years, in possession and not in reversion, A made a lease of 21 years to his only daughter, to commence from the day of the date. The court held this a good lease, and Lord Mansfield and the court considered every case on the subject, and decided that *from* may mean *inclusive* or *exclusive* of the day, according to the context and subject matter ; and the court will construe it so as to effectuate the deeds of the parties, and not to destroy them.

3 Bl. Com.
318.—
1 Caines' R.
153.
1 Mass. R.
143, Com-
monwealth v.
Hearsey.

§ 3. A day's journey in the Civil law, and in the law of England, is estimated 20 miles ; so in the law of New York, as to notice.

§ 4. Where there is one date, as the 15th of October, 1802, in the penalty of a bond, and another in the condition, as October 25, 1802, the date in the penal part was taken as the true date.

12 Mod. 401,
Bishop & c. v.
Bridges.

§ 5. In this case it was held that if A give a general release to B, on a certain day, and he the same day gives a bill or note to A, bearing even date with the release, this shall not discharge the bill or note ; but the release shall be deemed to be first made.

Marius Lex.
Mer. 24, Chit-
ty on Bills
106, is cited
6 T. R. 212.

§ 6. If a bill be payable on a certain day, it is not payable till the day is expired, and no action can be commenced till the next day. But it is to be considered that by a modern commercial rule, on bills and negotiable notes, the day of the date is not computed, but the day of the demand or payment. And " a bill payable at so many days sight, is to be accounted so many days next after the bill shall be accepted, or else protested for non-acceptance." Where four days may be from Wednesday to Tuesday, as four days to perfect bail after exception ; exception on Wednesday, party has to the next Tuesday ; for Wednesday is exclusive, Sunday is no day, and Monday is all reckoned inclusive.

2 H. Bl. 56,
North v. Evans.

ART. 6. *The effect of altering the date of a bill.* § 1. In this case the court held, Lord Kenyon, Ashhurst, and Gross, Justices, *contra* Buller, that where the date of a bill accepted was altered by one unknown, from March 26th to March 20th, the bill was, thereby, rendered void—and that no action lay upon it against the acceptor, even in favor of an innocent endorsee, for a valuable consideration; that the date is a material part of the bill; and that there is no difference between a bill and a deed. If any however, the law will accord most against the alterations of bills that circulate in the market. Deed may be altered by consent of parties in a material part. In this case the court decided, that if a note be given to pay in sixty days, the court will supply the words *from the date*, and construe it to exclude the day of the date; for otherwise a note payable in one day, would be payable immediately after making it. 13 Johns. R. 470.

§ 2. This court decided, that if a statute be passed on the 1st. day of July, 1812, as the double duty act of Congress was, to take effect from and after passing it, the day of passing the act is excluded, and it takes effect *from* that day. A writ of error was sued out, but dropt. So is *Latless, ex'r. v. Holmes & al.* T. R. 660; but *secus* Ch. 224, a. 7, s. 4.

§ 3. This was *assumpsit* on several promissory notes, each under \$5, made by the defts. payable to bearer, all dated before April 1, 1805, not wholly in writing but partly printed. By statute of 1804, ch. 58, no action could be maintained on such notes issued after April 1, 1805. Held, the defts. must prove these notes issued after April 1, 1805, to bring them within the act, and that the plts. were not bound to prove the delivery to themselves.

§ 4. October 2, 1775, Congress resolved that when the word *month* is used, a *calendar* month is meant. This was only making the common opinion of the country statute law.

§ 5. The bond declared on, bore date October 3, and the bond produced, on *oyer*, January 3, preceding. Deft. demurred generally to the declaration—joinder—demurrer withdrawn and deft. pleaded general performance of the condition of the bond; plt. replied, and assigned a breach &c.; the deft. rejoined; to this rejoinder the plt. demurred specially, and assigned five causes of demurrer; judgment thereon for the plt.; deft. on leave filed an additional plea; replication thereto, and judgment for the plt. below; deft. filed bills of exception &c. On error brought, Supreme Court of the United States held, 1st. The said *variance* as to the date of the bond was matter of substance and fatal. 2d. By the *oyer*, the bond was made part of the declaration. 3d. There was a bad declaration, a bad rejoinder, and a special demurrer by

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4 T. R. 320,
Master v.
Miller.
Officer alleged to have been appointed one day, proof appointed a day before, and continued on that alleged, is good,
2 Day's Ca. 528.—See
Ch. 97, a. 3.
—8 Mass. R. 453, Henry v. Jones, cited
2 Phil. Evid. 19.
District Court Maine, Dec. 1812,
United States v. Patten & al.
6 Mass. R. 451, Bailey & al, v. Taber & al.

3 Cranch 229,
Cooke v.
Graham's
ad'mr.

CH. 28. the plt. to the rejoinder. 4th. When the pleadings are thus spread on the record by a demurrer, it is the duty of the court to examine *the whole*, and go to the first error. 5th. When the special demurrer is by the plt., his own pleadings are to be scrutinized, and the court will notice what would have been bad on a *general* demurrer. 6th. This variance in the date of the bond had clearly been bad on general demurrer. When a note demandable immediately, is on interest from a month named, but no year, the month of the name is that nearest the date. 3 Caines' R. 89, *Whitney v. Crosby*.

CHAPTER XXVIII.

ASSUMPSIT, RULES OF DAMAGES IN; DAMAGES HOW ASCERTAINED THEREIN.

See Ch. 101,
a. 3, s. 10.

As the sole object of this action is to recover damages for a breach of contract or promise, the principles on which, and the rules by which damages are ascertained, may very properly be considered here. And though they are generally ascertained by the jury in a late stage in the suit, yet rules in cases of contracts will generally be found, by which the jury is to be governed. It is best to bring these rules together in order to have a fair view of them.

As by our law, an action must be brought before a Justice of the Peace, or in the Common Pleas, without an appeal, or with one, according to the sum the plt. recovers, it is best, and often necessary, before the plt. commences his action, to consider, and often accurately, by what rules, and on what ground, the sum he may recover in damages will be ascertained. The like inquiry is important in New York, and most of the other states.

Mass. Act,
Oct. 30, 1784.
4 T. R. 276,
Sheppard v.
Chester.—
6 T. R. 87.

ART. 1. *General principles.* § 1. By the act, it is provided that when the deft. does not appear "by himself or his attorney, his default shall be recorded, and the charge in the declaration shall be taken and deemed to be true, and the court thereupon shall give such damages as they shall find, on inquiry, that the plt. shall have sustained," unless he move for a jury of inquiry, to inquire into the damages. Hence by this act the plt., at his election, may have his damages assessed by the judges or the jury. *Laws of Maine, Ch. 59.*

§ 2. The English practice is to ascertain the damages by the judges only, when it is a mere matter of calculation; and if the amount of the plt's. damages can be ascertained without a jury's intervention, it may be proved under a commission of bankruptcy, as stock on a certain day; so interest on a given debt for a certain time. 8 D. & E. 326, 395, 410; Dougl. 302; 1 H. Bl. 252, 541; 3 Dal. 355; 2 Saund. 107.

§ 3. In this case the manner of computing damages on depreciated money, was this; first the paper was reduced to specie value by the scale of depreciation; and then the interest was computed on the specie amount, and both constituted the plt's. damages. Same rule in Virginia, as to British debts paid to the state. 1 Hen. & Mun. 144, *State v. Walker*.

§ 4. In this case the *warrantee* of lands was evicted of them by an execution for the debt of the *warrantor's* testator, and the *warrantee* redeemed them within the year; the sum he paid, and interest, was held to be the measure of his damages; this sum removed the incumbrance. Decided in an action on the covenant in the deed. Same rule settled in New York.

§ 5. It is a settled rule that the plt. may recover less, but never more damages than he declares for, but he may always recover his costs over. And in all cases where the plt. has damages by the common law, he also has costs.

§ 6. In *assumpsit* promises are the foundation of damages, which are for the delivery of goods, or for transporting stock, or some property, on demand, or on some day named; sometimes to pay an unreasonable sum, and sometimes on failure to perform, to pay a sum in the nature of a penalty. In these cases it is material to see how, and at what point of time, the plt. is to have his damages.

§ 7. The judges will increase the damages given by the jury only in *mayhem*, and this on inspection, and according to discretion.

§ 8. In this case the court held, that if the plt. in *replevin* neglect to prosecute his action, or *replevy* goods taken in execution, the deft's. damages are 6 per cent. on their bond, and in all other cases such as the jury shall assess.

§ 9. Damages assessed against defaulters, though deft's. pleading to issue acquitted; and see *Hill v. Goodchild*.

ART. 2. *Promises to deliver goods, transfer stock, &c., on a day named.* § 1. If in these cases the plt. has a right to lay the express promise aside, and resort to his *legal assumpsit*, it is a distinct matter, and will not be considered in this place. But if he brings his action on the express promise, the question is how his damages shall be ascertained; between the day of delivery agreed on, and the day of trial &c., the value may vary very much.

CH. 28.

Art. 2.

3 T. R. 539,
Utterson v.
Vernon & al.
—4 Dal. 149.
—1 Dal. 185.
—5 D. & E.
87.
4 Mass. R.
103, *Edes &*
al. admrs., v.
Goodridge.

4 Mass. R.
151, *Wyman*
v. Brigden.

Imp. M. P.
191, 192.—
1 Salk. 113.

See the rule
as to dama-
ges in the
Civil Code of
Louisiana, p.
263, n. 50 &c.

1 Dyer 105.
—1 Wil. 5,
Brown v.
Seymour.
4 Mass. R.
614, *Bruce v.*
Learned.—

2 Strange
1222.

CH. 23. § 2. But the rule seems to be well fixed, that the value on
 Art. 2. the day agreed upon for the delivery, transfer, &c., shall be
 ~~~~~ the measure of damages, with interest thereon from that day.  
 On that day, or at least the moment it ends, the plt. becomes  
 entitled to have the goods or stock &c. ; his right of action  
 then attaches to recover his damages for the non-delivery or  
 transfer, and the right of action is not affected by any subse-  
 quent rise or fall in price of the things to be delivered or  
 transferred ; and so are the authorities on the whole. English  
 cases generally so ; only one case, *Shephard v. Johnson* is  
 contra ; and this doubted.

Gil. on Leas-  
 es 360.—  
 3Cranch 298.

§ 3. The jury must assess damages according to the value  
 of the corn, at the time it was to be delivered. And where  
 the recompense is merely in damages, the rule is the same in  
 simple and special contracts. In 1779, land in Virginia was  
 leased by deed, annual rent £26, current money, forever.  
 Held, the rent was to be reduced, not by the scale of depre-  
 ciation, but the actual annual value of the land at the time the  
 contract was made, in specie. 2 Cranch 10, *Faw's case* ; 1  
 Hen. & Mun. 361, 338, *Nichola's ex'r. v. Tyler*, in chancery.  
 A bond was given while paper money was depreciating ; ad-  
 judged it was not liable to the scale of depreciation, in case of  
 proof, by circumstances, it grew out of a hard money debt,  
 payable therein, though this fact did not appear on the face of  
 the bond ; the circumstances appeared in accounts in writing.  
 See *Ambler v. Wild*, 2 Wash. 36 ; *Bogle & al. v. Vowles*,  
 1 Call. 244 ; *Call v. Ruffin*, 1 Call 334 and 524 ; *Walker v.*  
*Walker*, 2 Wash. 195 ; *Pleasants v. Bibb*, 1 Wash. 8, on this  
 subject of depreciation. Though the Virginia act applied the  
 scale at the date of the contract, it allowed the courts some  
 discretionary power, and *Shipwith v. Clinch*, 2 Call 253, the  
 inquiry went behind the date of the contract.

2 Hen. & M. 550, 557, *Faulcon, admr. of Hamlin, v.*  
*Harriss* ; depreciation of specie from 1774 to 1783 &c., 100  
 per cent. in Virginia, compared with lands and slaves, as when  
*Harriss*, in 1782, gave a bond to *Hamlin*, \$50,000 penalty,  
 conditioned to pay £1000 specie, "or such further sum as  
 should be equal to the said £1000, in the year 1774, that is  
 to say, to purchase as much land and as many negroes as it  
 might have done at that time." Held, not usury, and the ju-  
 ry found £1000, in 1774, would have purchased as much  
 land and as many slaves as £2000 in 1782, 1783, 1784,  
 1785, 1786 and 1787, within which years said bond was pay-  
 able. Held, also the plt. to recover such difference must  
 state and aver it in his declaration.

Hob. 43, in  
 Cowper

§ 4. If one be entitled to *estovers*, and is deprived of them,  
 v. Andrews.—Lutw. 58.—3 Wils. 429.—Stra. 406.



he shall recover damages not according to the value when the action is brought, but the value when they become due. In all the declarations in the books, the value is laid on the day of delivery. Dyer 82; 8 D. & E. 162, *Saunders v. Kentish*.

CH. 29.  
Art. 3.

§ 5. If one be to pay on such a day five quarters of corn, and at the day of the contract entered into it is valued at £50, and at the day of payment at £5, the promise will be entitled either to the five quarters of corn or the £5. Hence, if he sue for the damages on the contract, £5 is the measure of them. But if the thing, as stock to be transferred, rise in value after the day and before the decree, a court of equity may order the thing itself to be delivered. Damages, the value of the flour the day the cause of action arose.

Powell on  
Con. 409.—  
1 Vern. 217,  
Speake v.  
Speake.—  
2 Vern. 394,  
Gardiner v.  
Pullen.—  
3 Cranch 278.  
Forrest v.  
Elwes.

§ 6. In this case, *Fish v. Wheeler*, the declaration was on a note of hand, dated Dec. 26, 1781, value received in continental money, I promise the plt. to pay him or order £600 in Pierce's and Imlay's final settlements, so called &c., on or before the 26th day of February 1787, with interest if not paid at the aforesaid time. No value was laid in the writ. These kind of public securities at this time of payment were worth 2s. 2d. in the pound, when the action was commenced 7s., and at the time of the trial 12s. 4d. in the pound. The question was if the jury should assess as damages the value 2s. 2d. in the pound on Feb. 26, 1787. After several arguments this value at the time of payment was adopted by the court as the rule. Same principle adopted 3 Wheaton's R. 200; also 3 Cranch 298; same principle 6 Wheaton 209, 218; holds too as to real estate, *id.*

Mass. S. Jud.  
Court, Nov.  
1790, Essex,  
*Fish v. Whee-*  
*ler*.—5 Burr.  
2593.—Stra.  
406, Dutch v.  
Warren.—  
2 Burr. 1011.  
—3 Ves. jr.  
629.—4 Ves.  
jr. 492.—  
2 Cain. Er.  
216.—1 Wash.  
1.—1 Bay.  
105, 309, 357.

§ 7. The underwriter's contract of insurance is of indemnity or of warranty, that the thing shall go safe and undamaged; and if damaged, he will pay the amount of the damage, that is, the proportion of damage, as a fifth, a sixth, &c. taking the prime costs as the basis; that is, the costs "at the outset," the shipping port. "He has no concern in any after value," in any rise or fall of the market.

Lewis v.  
Rucker,  
2 Burr. 1167.  
—2 Marshall  
636:

§ 8. The grantor of land covenants in his deed he has an indefeasible title; after eviction the grantee recovers only the value of the land when the deed was made, for then the cause of action arose.

4 Dallas 441.

ART. 3. *Promises to deliver &c. on demand.* § 1. In this case the time of the demand made is the rule; then the plt. becomes entitled to the thing, and his right of action attaches and interest begins.

§ 2. This case, *Bartlett v. Moulton*, was *assumpsit* on a note to pay or deliver corn on demand. The court held, 1st,

Mass. S. Jud.  
Court, June  
1784, *Bartlett*  
Insolvency.

*v. Moulton*. Greenough v. Amory, post,

**CH. 28.** there must be an actual demand made, and that the contract is not broken till the demand is made : 2. That the damages must be estimated according to the price of corn at the time of making the demand : 3. That fish to the amount of £27 paid and endorsed on the note was no evidence of a demand of payment.

**Art. 4.**

3 T. R. 539,  
549, Atterson  
v. Vernon.

§ 3. The promise in this case was to transfer stock, but no time was named for doing it. The promisor became a bankrupt. The court held, that the day of the bankruptcy was the last day he could have to transfer the stock, and directed the jury to enter a verdict for the plt. for £5750, the price of the stock on that day. As this was the last day he had to transfer, it became a first day and operated as a day appointed, or as a demand, as the plt's. right of action then commenced and attached. In cases of *frauds* the jury is not restrained to any particular rule of damages.

1 Day's Ca.,  
250.

2 W. Bl. 1078,  
Flureau v.  
Thornhill.

§ 4. In this case it was decided, that if A agrees or contracts to buy lands, to which without collusion the title proves defective, he is not entitled to any damages for the loss of his bargain ; and Blackstone J. said, " these contracts are merely on condition frequently expressed, but always implied, that the vendor has a good title." " And if he has not, the return of the deposit with interest and costs is all that can be expected."

Dougl. 376,  
762.—3 Wils.  
206.—4 Com.  
D. 406.—  
2 W. Bl. 761.

§ 5. In all these cases it seems reasonable for the jury to give interest as damages, after the day fixed for payment, or after the demand made, on general principles. See Interest and Insolvency, post.

2 Ld. Raym.  
1382, Baker  
v. Backe.

§ 6. No damages can be recovered for any matter arising after action commenced. If entire damages be given, judgment is arrested if it cannot be for all.

**ART. 4. Promises to pay unreasonable sums.**

1 Wils. 296.  
—1 Lev. 11,  
Jones v. Mor-  
gan.

§ 1. When a bargain is so exceedingly unreasonable as evidently to have been made under some mistake of both parties, the promisor may be relieved and charged with reasonable damages even by a jury, as where one agreed to pay for shoeing a horse, a barley-corn for the first nail, and so double every nail, which amounted to 500 quarters. The court directed the jury to find a less and reasonable sum. This was held clearly to be a bargain that no man in his senses would make. There is a like case 6 Mod. 305.

12 Mod. 542,  
543, Filter v.  
Veal.

§ 2. Where the plt. has recovered damages in assault and battery, they are according to the injury, and a full satisfaction ; and no action lies for consequential damages.

1 Mass. R.  
153.

§ 3. Where by law damages are to be doubled or trebled, and the jury finds single damages, the court doubles or trebles them &c.

§ 4. Owners of a vessel held to pay more for their master's misconduct to the party injured by him than they recovered of him in their suit against him. The sum they paid not a fixed measure; 1 Dallas 185. CH. 28.  
Art. 5.

ART. 5. *Damages agreed as measure.* § 1. When a forfeiture or sum is named in an agreement &c., the question often is, when it is fixed by the parties and ought to be considered as the measure of damages; or when it is a mere penalty to be chancered, or damages liquidated by the parties and not to be chancered. If a servant depart from his master's service and pay the penalty, no action lies against the enticer. And Lord Mansfield observed, the true construction of all articles guarded with a penalty, is to afford either "of two remedies to be pursued at the option of the party injured;" one from time to time for *real damages*, and a remedy given in *terrorem* by way of punishment beyond the value of the injury done, and therefore called a penalty. When equity considers this penalty as a security to enforce the performance of the thing it will relieve against it, but not when considered as a rigorous punishment.

1 W. Bl. 389, Bird v. Randall.—6 D. & E. 636.—1 Day's Ca. in E. 260, 265. In actions of fraud the jury is not confined to any precise rule of damages, Norton v. Hatheway & al. And on a written contract for a sum certain, that is, the measure, *id.* Tyler v. Marsh.

§ 2. In this case, *Lawrence v. Parker*, this subject of liquidated damages is considered; and there is considerable doubt what damages are to be viewed as liquidated or ascertained by agreement of the parties.

1 Mass. R. 191, *Lawrence v. Parker*.

§ 3. This seems now to be well settled, that one in this case of assumpsit, as well as in some other cases, may recover in damages more than the penalty of a charter-party or other contract, for a breach thereof. So more than the penalty of a bond, 6 D. & E. 303; 1 East 436; see Ch. 112, a. 5, s. 3; Bunb. 23; 4 D. & E. 33; 2 H. Bl. 436, 547; 2 W. Bl. 1190; 2 P. W. 191; Stra. 533; 10 Mod. 511; 2 Dal. 352; 4 Dal. 149.

1 W. Bl. 395, *Winter v. Trimmer*.—2 T. R. 398, *Longdale v. Church*.

§ 4. And even against a surety in a bond, though this has been much contested. But it may be observed, that when the surety makes the contract as to pay money with interest, he engages as to all the reasonable consequences; and his contract in fact, is to pay principal and interest, though they shall together exceed the penalty. See Ch. 148, a. 1, s. 9, as to surety; but see a. 13, s. 3.

1 Mass. R. 308, *Harris v. Whittemore*.

§ 5. If one agree to perform certain work each week, and on failure to pay a weekly sum, this is not a penalty; but is in the nature of liquidated damages. Ashhurst J. said, this is a case of liquidated damages agreed on to prevent disputes; it would be difficult for a jury to ascertain the damages. Buller J. said, this is a case of liquidated damages, and like *demurrage*. In either case it is impossible to ascertain precisely what damages the party has really sustained; and

2 T. R. 32, 37, *Fletcher v. Dyche*.—2 Bos. & P. 346, 354.—3 Caines' R. 43, but 6 Ves. 411.

**CH. 28.** therefore, the contracting parties agree to pay a stipulated sum. No damages on recognisance of bail for delay of execution, 2 *Ld. Raym.* 1130.

**Art. 5.**  
 4 *Barr.* 2226,  
*Low v.*  
*Pears.—Pow.*  
*on Con.* 205.  
 —6 *D. & E.*  
 13, 14.

§ 6. The party agreed to marry or pay such a sum; this sum is fixed, and is the ascertained damages by agreement, and Lord Mansfield said, “there is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election.” *Stinson v. Hughes.*

2 *Wils.* 5, 6,  
*Cooke v. Pettit.*  
 —6 *Wood's*  
*Con.—*  
 2 *Vern.* 119.  
 —*Finch* 117.  
 —3 *Atk.* 395.  
*Mod.* 8 & 9,  
 113.—2 *Pow.*  
*on Con.* 206,  
*Wafer v.*  
*Mocato.*  
 3 *Bl. Com.*  
 435.

§ 7. On a bond or contract given to save a parish harmless from the maintenance of a bastard child, the court held, that a penalty in such a contract cannot be chancered, and is not within the 3 & 4 of Anne. It must be because there is no rule to chancer by. 1 *Fonb. Eq.* 142, 156; 2 *Do.* 423.

§ 8. “Chancery never relieves, but in such cases where it can give some compensation in damages, and when there is some rule to be the measure of damages to avoid being arbitrary;” never without a rule or measure of damages.

§ 9. A court of chancery no more than a court of law can relieve against a penalty in the nature of stated damages; “nor can mere damages” be adjudged by the chancellor’s conscience, but only by a jury, it is their exclusive province to ascertain mere damages, except in Justices’ courts &c. in small cases, and not in these in all the States.

2 *Chan. Cases*  
 198.—2 *Pow.*  
*on Con.* 206,  
*Blake v. E. I.*  
*Company.*

§ 10. One, an agent of the company, covenanted he would not trade for himself &c. in several commodities, on a penalty, which much exceeded the value of the goods; he did however trade. Being sued, he proved the trading to be for their benefit. But the court held, there could be no relief against the penalty, as there was no measure of damages.

*Mass. S. J.*  
*Court, June*  
*1784, Peters*  
*v. Wilkins.*

§ 11. Peters bound himself to find Mrs. Wilkins necessaries during life, and mortgaged land as security; he neglected to find the necessaries &c. and she brought an action of ejectment to recover the land. And the court held, the contract could not be chancered, there being nothing, no rule to ascertain the damages by, and the court said that they may amount to the penalty.

2 *Wils.* 377,  
*Drape v.*  
*Brand.*

§ 12. But in a lease it was provided, that if the lessee cut trees and did not repair, he should be subject to the penalty of £500. He cut trees and did not repair, but the court held, that on 8 & 9 *W. III. Ch.* 10, the jury ought to consider the whole case, and assess the real damages done to the farm.

*Cowp.* 357,  
*Goodwin v.*  
*Crowle.*  
*What a pen-*  
*alty, 2 Bos. &*  
*F.* 346.

§ 13. And where the deft. agreed on a penalty of £250 to sink a pit, and to begin in fourteen days, and failed. On the 8 & 9 *W. III.* Lord Mansfield said, the act directed that the penalty should not be levied in any case, but the judgment

must be as usual to recover the debt as heretofore, but then it only stands as a security for the damages sustained.

CH. 28.

Art. 6.

§ 14. From these, and many other cases that might be cited, it is difficult to decide when the plt. is to recover the penalty in any contract as such, or the penalty as damages stated by the parties; or 3d, when he is to recover real damages. No precise line seems to be drawn between the cases. By the Massachusetts acts, provision is made respecting penalties; but they do not affect the above distinctions.

3 Bos. & P.  
630.—2 W.  
Bl. 1190.

§ 15. This act provides that in all cases, in the Supreme Judicial Court or Common Pleas, "to recover the forfeiture annexed to any articles of agreement, covenant, contract, or charter-party, bond, obligation, or other specialty," when the forfeiture, breach, or non-performance, shall be found by a jury, by the default or confession of the deft., or upon demurrer, the court make up judgment for the plt., "to recover so much as is due in equity and good conscience."

Mass. Act,  
Nov. 4, 1795.

§ 16. And by another act it is provided, that a judgment on a penalty in a bond, payable by instalments, shall stand as a security for further damages. These acts are the old province laws revised.

Mass. Act,  
March 1,  
1799.

§ 17. On these acts a penalty can be found or confessed, and so recovered; or when the plt. sues for it, and it can be *chancered* only when he sues for it, and then, as in the case of *Peters v. Wilkins*, only when there is something to *chancer* by; and as in the case of *Cook v. Petit & al.*, before. So it cannot be *chancered* where the sum is as damages agreed and stated by the parties, as in *Fletcher v. Dyche*; or where the plt. sues merely for his damages, as stated in some of the preceding cases.

§ 18. If there be any general principle applying to the cases, a part of which are stated in this fifth article, it is this—that whenever one agrees to perform services &c., and if he fail, to forfeit such a sum, this sum is the measure of damages, whenever it may be inferred the parties so intended it, or whenever it is the best rule in the case, from the uncertainty in applying any other, for want of a measure of damages.

§ 19. In debt on the penalty of a bond, payable by instalments, according to said act of 1799, the court will enter judgment for the damages incurred up to the time of the judgment.

1 Mass. R.  
10, 12, Wal  
do v. Fobes  
& al.

§ 20. In a judgment on a mortgage, principal and interest were allowed exceeding the penalty.

2 Mass. R.  
118, Pitt v.  
Tilden.

ART. 6. *Nominal damages.* § 1. If judgment be obtained against a bankrupt, who has obtained his certificate for a debt due before the bankruptcy, and the execution be delivered to

2 Mass. R.  
374, Selfridge  
v. Lithgow.

CH. 23. the sheriff, and he neglect to serve it, the creditor can recover only *nominal* damages.  
Art. 7.

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Sparhawk v. Bartlett.
2 Mass. R. 256, Burrill v. Lithgow.

5 Mass. R. 104. Wheelock v. Wheelwright.

8 Mass. R. 223. Pierce v. Fuller.

10 Mass. R. 470. Weld v. Bartlett.—
14 Johns. R. 389, as to mitigating damages.—
1 Johns. R. 110.

3 Dallas 302, 304, 337.

Salk 11.—
3 Dallas 88, 115.—11 Co. 6, 7.—1 Hen. & Mun. 488.—Cro. Jam. 73, 118.—
4 Bac. Abr. 116, Saben v. Long.

5 Burr. 2790, Hill v. Goodchild.—
2 Esp. 116, 116.—Chapman v. House,

§ 2. So nominal damages were given in this case because the debtor was insolvent. Action against the sheriff.

So in an action against the sheriff for the escape of a debtor, committed on original process, through the insufficiency of the goal, the jury has a discretion in assessing damages, and are not bound to find the whole sum. See *Escape*, Ch. 65, a. 5.

§ 3. This was trover for a horse, and damages were assessed by the direction of the court.

Damages, proper evidence to increase or decrease, see *Evidence*, Ch. 85. Reasonable damages for taking insufficient bail, 13 Mass. R. 187, 189, Shackford & al. v. Goodwin.

§ 4. *Penalty, the measure of damages.* This was debt on an obligation by which the deft. for \$1 consideration agreed not to run a stage between Boston and Providence in opposition to the plt's. stage; penalty \$290. Held, this agreement valid, and as the deft. had violated it, he had incurred the penalty, the measure of the damages liquidated by the parties; and this was only a *limited* restraint on the deft's. trade or business.

§ 5. *Case against a sheriff for the neglect of his deputy, Coburn.* Coburn had an original writ against W. Hill, for the plt. Hill was in extreme sickness and poverty, and Coburn having arrested him, returned he had taken bail, when in fact he had taken none. This action was for a *false return*, and the deft. was permitted to shew these facts in mitigation of damages, and that the debtor having recovered his health did not conceal himself. The jury gave nominal damages, and held well.

§ 6. Judgment or decree affirmed on error, no damages but for the delay.

ART. 7. *Damages in trespass.* § 1. A recovery in an action for assault and battery bars all future actions or damages. If two commit a trespass or convert goods, and the plt. recovers against one, it bars trespass or trover against the other; for the judgment reduces the uncertain damages to a thing adjudged. If two commit a trespass, release to one (see *Cook v. Jenner*, Ch. 167, a. 3,) is a bar as to the other. Judgment for the best of several damages in trespass, 1 Wils. 30.

§ 2. In a *joint* action of trespass, when the jury find the *defts. jointly guilty, the jury cannot sever the damages*, according to the degrees of guilt; as 1s. to one, and 40s. to another; same rule if defaulted, *Stra.* 422; this is the case
Slater and Goodacre, 2 *Stra.* 1145.—See *Carth.* 19, 20.—See *Ch.* 91, a. 8, s. 6.

when they plead jointly, for if they sever in their pleas, and the jury find *severally*, different damages may be assessed. As in trespass against three defts. for taking goods and false imprisonment; House let judgment go by default, Slater demurred, and Goodacre pleaded not guilty; he was acquitted; the jury assessed damages, 1s. as to House, and £100 as to Slater, and held well. In this case it will be observed, there was no *joint* finding by the jury; a material circumstance. In this case were cited Lowfield v. Bancroft & al., which was an action for a malicious prosecution, and held, the jury could not assess *separate* damages; this case is not material for the defts'. pleas are not stated, and they pleaded jointly for any thing that appears. Also cited Stra. 79, Lane v. Santloc; pleas do not appear nor finding.

This was trespass for battery and wounding, brought by H. against C. and H. in the C. B. One pleaded to all except wounding, that it was in self-defence, and as to the wounding, *not guilty*. The other justified all in self defence. Issues joined, and the jury found both issues against the first, so guilty of the whole trespass charged, and assessed damages £20, also found against the other so guilty of the whole trespass and assessed damages £100. Judgment accordingly reversed on error, because the damages should have been joint and but one sum, and clearly so, for a joint trespass was charged, and in fact a joint trespass *was found*, for each was found guilty of the *whole of one and the same trespass*, for which one and the same trespass there could be but one satisfaction; for it is clear where the jury find *jointly* even only in substance, one trespass only, they cannot sever the damages.

This was trespass against three defts.; one confessed the action, the other two pleaded not guilty, *jointly*. Verdict for the plt., and £1000 damages against one, and £50 against the other. The plt. entered a *nolle prosequi* against him defaulted, also against the one for the £50, and took judgment only for the £1000 against Strode; so this cured the defect of the verdict. This case seems clear, for here one deft. admitted the whole of one and the same trespass, and the other two joined in denying the same.

So in this case trespass and battery, two of the defts. pleaded *son assault, &c. severally*; the third, *not guilty*. Jury found both issues for the plt., and *several* damages against the two, and held ill; for it is one joint entire offence by the plt's. action, and when all are found guilty, the damages must be entire; so far there is no doubt; but added if trespass be against divers, and one is found guilty of *part* and the others of *all*, there may be several damages; this may be doubted, espe-

CH. 28.
Art. 7.



Crane and Hill v. Hammerstone, Cro. Jam. 118, in error. —See many cases cited 3 Mod. 101, 103, and Rodney v. Strode at large.

Rodney v. Strode, Carth. 19, 20.—See 1 Bulstr. 157, like case 6 D. & E. 199, see Ch. 194, a. 3, s. 3, this case.

Austin v. Wilward, Cro. El. 860.—2 Hen. & M. 355.

CH. 28.
Art. 7.



4 Mass. R.
419, Kenne-
bec proprie-
tors v. Boul-
ton & 9 oth-
ers.

cially on joint pleas, and especially if those guilty of all, are punished for all.

Remark—the rule, on the whole, is, if the jury find but one trespass, it is entire, however committed, and there can be but one satisfaction, and that entire. *Secus* if several trespasses be found.

§ 3. Trespass, *quare clausum fregit*, and cutting down the plts'. trees; five defts. were defaulted, and the other five pleaded severally not guilty, issue joined. Proved all the defts. were in the plts'. close at the same time, cutting down their trees, and making them into shingles, which they carried away. But the five defts. defaulted, formed a company by themselves, and acted for their own use separately. Four others formed another company in like manner, and acted separately. One was associated with a third party, acting separately in like manner; he only of that party was sued. Damages assessed jointly, against the five for their trespass. So against the four for their trespass. And against the one for the third trespass. All found guilty. Five who pleaded, moved for a new trial &c. Joint costs against all. And the court said the law is well settled "when the trespass is found by the jury to be committed *severally*, by the defts., who *plead severally*, the damages ought to be *severed*; but if the trespass be *joint*, the damages must be *jointly* assessed, although the defts. *plead severally*." *Ammonett v. Harris & Turpin*, 1 Hen. & Mun. 488, 499. *Ammonett* brought trespass of assault and battery against twelve defts. jointly, and process was served on four, two defts. and two others; the other two, C. and L., appeared and pleaded not guilty. The jury found them guilty in general terms, and assessed damages *jointly*, the plt., by order of court, released a part to the two defts., saying nothing as to the others, and took judgment for the residue of the damages assessed and therefor execution ordered; then the plt. proceeded against *Harris and Turpin*, other two defts., and held he was barred by said judgment, being *one entire satisfaction for one entire trespass*; but the court seem to think if he had not taken said judgment he might have proceeded for additional damages against others of the defts., and take final judgment *de melioribus damnis* against any one, or for any one sum assessed—agreed as to the *notte prosequi*, as in *Rodney v. Strode*. The observation appears correct, for until the plt. takes judgment, he is not satisfied or barred; and all the numerous cases, English and American, are governed as to *joint* or *several* damages by one distinction; that is, if but one entire trespass is found or appears, there can be but one satisfaction, and that one entire sum in damages; but several trespasses as to time, place, or otherwise, and one deft. committed one, and another another

&c., then their cases are several. So a release to one joint trespasser in assault &c. is a bar as to all; so is accord and satisfaction, though the sum received and the release be express, it shall be a bar only as to the one. *Ruble v. Turner & al.*, 2 Hen. & Mun. 38, 49, was no seal on the instrument; the District Court also so decided in which the action was so commenced. If A, B, and C, commit a joint assault and battery on D, and he sues A alone, and gets judgment for damages, it is a bar as to all; *Wilkes v. Jackson*, 2 Hen. & M. 355, 361.

§ 4. If the jury assess damages in trespass, namely, £1000 against A, and £50 against B, the plt. may take judgment against A only, for the £1000, for as the plt. might have sued them jointly, or severally, he may have the same election as to damages, or he may take execution against both for the greater damages.

§ 5. To have an increase of damages in case of a maim or bad wounding, on inspection &c., the manner of the wounding must be stated in the declaration. See 1 Raym. 176; Latch 225.

§ 6. Trespass, *quare clausum fregit*, the plt. is not allowed to prove the deft. took a horse, as this bears a separate action; but in *quare clausum fregit et domum fregit*, the plt. may prove the deft. came into his house and defiled his daughter; for this, as it respects the father, does not bear a separate action, but is in aggravation of damages.

§ 7. *What a penalty.* A and B made an agreement in writing, by which A agreed to convey to B 700 acres of land, to be appraised in part payment of a farm valued at \$3750. B contracted to sell to A, and it was agreed if either failed to perform his contract, he should forfeit and pay \$2000 and damages. Held, this \$2000 was a penalty, and so the parties intended.

ART. 8. *Damages applied to the good part of the declaration.* § 1. As where part of a declaration states a sufficient ground of action, and a part is not actionable, the court will intend, after a verdict, that the jury gave damages only for the actionable part of the declaration. 1 Johns. R. 442. And a corporation taking and using a man's land, by law is liable to pay damages only for its negligent use of it.

§ 2. *Damages assessed for part.* This was trespass for breaking the plt.'s close and taking away his fish. The declaration was good as to the close, and bad as to the fish; because the plt. did not state the number and kind of fish. Entire damages were assessed, and judgment arrested, and the court said the plt. might have got the jury, if he had been wise, to assess separate damages, so much for breaking the close,

Ch. 28,
Art. 8.



Bul. N. P. 20,
is the case
above.

Bul. N. P.
21, Cook v.
Beal.

Bul. N. P.
89; Ch. 28.

2 Johns. Ca.
297, Dennis
v. Cummins.

2 Johns. R.
233, Steele v.
Western
Island Lock
Nav. Com.
Laws, of N.
Y. Vol. 1, p.
334.

5 Co. 35,
Flaytor's
case, Cro.
Car. 64, 239.
Hob. 66, 70.

CH. 29. and so much for taking the fish, and then the plt. should have
 Art. 1. had judgment for damages for breaking his close with costs.

§ 3. *Where the jury must assess damages jointly, &c.* Resolved when trespass is brought against several defts., and they plead not guilty, or several issues, and the jury find for the plt. in all, the jurors cannot assess several damages against the defts., because all is but one trespass, and made joint by the plt. by his writ and declaration. And if one give the blow, and do in fact more injury than another, yet all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party present. But in trespass against two, if the jury find one guilty at one time and another at another time, they may assess several damages. So if the defts. appear at different times and plead, there can be damages but once. Trespass against A and B; A makes default, a writ of inquiry of damages must be awarded against him, and issued, if there be no verdict against B; but if one against B, then A shall be contributory to the damages assessed against B. Quære of contribution in *torts*.

§ 4. Trespass—defts. defaulted—plt. sued out several writs of enquiry—set aside on his motion because he could not have several damages.

§ 5. If a clerk make a mistake in the assessment of damages, the court will order him to make another assessment.

§ 6. After default, where the judges have power to assess the damages, they may receive an assessment by the jury, though not in a formal verdict, if assessed in the presence of the court.

§ 7. *Ad quod damnum.* The Circuit Court in the District of Columbia quashed an inquisition in the nature of a *writ ad quod damnum*. Held, an appeal lay to the Supreme Court, and that the Circuit Court could not so quash.

CHAPTER XXIX.

ASSUMPSIT. EXECUTORS AND ADMINISTRATORS, AND ACTIONS BY AND AGAINST THEM, AND GENERAL PRINCIPLES.

See Assets. ART. 1. § 1. It is now a settled principle, that whenever *assumpsit* lies against the deceased at the time of his death, or he is then bound in any promise expressed or implied,

though payable in *futuro*, his executor or administrator is liable if called on in season; for the law transfers the duty and obligation of the deceased in this case to his representative, appointed by himself or by the laws to settle his affairs. All the rights and duties of executors and administrators are materials for a volume, but only the most material can be considered here. To this purpose the party must be such an executor or administrator, as the law requires. Next, he must be liable to the action. This naturally involves the question when he is or is not liable at all; and when once liable, he is discharged by any act of limitation or otherwise. He is known in law as the representative of the deceased, and therefore generally in contracts made by, or to him, this representative need not be named in order to sue or to be sued on such contracts.

CH. 29.
Art 1.

§ 2. Under this head there will be found a great mixture of English common law adopted here, and statute law made in the United States. The object in this place is to consider the rights and duties of these representatives in regard to actions, as founded on the laws of the United States, the statutes of Massachusetts &c. and the common law so far as it applies.

§ 3. Executors and administrators acquire their authority in very different ways. Therefore, their appointments must be treated separately; but after appointed their powers and duties are so nearly the same, that actions by or against them may be treated very well together, as well as their rights and duties.

§ 4. By the 31 of Ed. III. it is enacted, that in case 21 H. VIII. where a man dieth intestate, an administrator shall be appointed &c., "who shall have an action to demand and recover as executor the debts due to the person intestate;" "and shall answer to others to whom the said deceased person was bound in the same manner as executors shall answer." And an Ch. 5. administrator is bound to account without citation, before the last 11 Mod 145. day in the condition of the bond mentioned, at his peril; and if an administration be granted by one who has no jurisdiction, 12 Mod. 617. it is void, and trover lies for the deceased's goods received under it.

§ 5. *Administrators, how appointed &c.* By a statute passed in Massachusetts Colony, A. D. 1641, wills were proved, and administrations granted for many years by the county courts, and in the vacation by two magistrates and the county clerk meeting together. Our present laws on this subject being in substance the province laws revised, it is unnecessary to state them. And it is also unnecessary further to notice the English statutes on this subject. The Civil law had no executors till a late period. Mass. Colony Laws 157, 168.

CH. 29.

Art. 1.

Mass. Acts of
March 9,
1784, sects.
8, 10, and
A. D. 1818.

§ 6. This act provides, "that after the decease of any person intestate, administration of such intestate's goods and estate shall be granted unto the widow or next of kin to the intestate, upwards of twenty-one years of age, or both, as the judge of probate may think fit," in thirty days or sooner, and that an inventory of all the estate of the deceased be taken in three months &c., and if the widow or next of kin refuse &c. after the thirty days, the judge may commit administration "to some one or more of the principal creditors," if accepted by them, or others, as he shall think fit upon their refusal; and each administrator so appointed must give bond, as the law directs, to render a true inventory and an account of administration: that no administration *de bonis non* be granted, unless it appear to the judge that there is personal estate of the deceased not administered upon, to the amount of £5, or upwards, and that no "administration be originally granted upon the estate of any person deceased, after the expiration of twenty years from the death of such person." On this law a minor is not entitled to administration. £5 was the sum in the Province act of 1723.

§ 7. By the 17 Ch. II, if the executor or administrator get judgment in England and die, the administrator *de bonis non* shall have a *scire facias*, as well as debt. This act has not been adopted here, as it has been held.

4 Mass. R.
348,
M'Gooch v.
M'Gooch.

§ 8. In this case it has been decided in construction of the above act, that the intestate's widow is exclusively entitled to the administration on his estate, unless there be among his next of kin a suitable person to be joined with her in the judge's opinion, or to administer alone. As to administration in other States, see s. 17 and art. 4, s. 19.

12 Mod. 617,
Slaughter v.
May.—1 Bin.
336.

§ 9. If administration be granted to one not next of kin, it is not void, and all acts done by him before it is repealed, are good. Administration may be granted to A, during B's absence, but his absence must be averred in A's declaration; Salk. 42; 2 Ld. Raym. 1071. And administration must be granted where the intestate has his domicile. So one's will of personal estate must be executed according to the law of the place of his domicile at his death; if void by that law, it will not pass personal estate in a foreign country, though executed according to the law there; 1 Bin. 336, *Desesbats v. Berquier*; 5 East 131; Toller 387.

6 East 131.
As to admin-
istration dur-
ing execu-
tor's absence,
see 8 Cranch
9, 30, can-
not be, if he

§ 10. *Who is next of kin*, may often be a question on the above act of March 1784, as on the English act of 21 of H. VIII, which is in the same words, to wit: "unto the widow or to the next of kin, or to both." So that the construction in this point given of this English statute applies here, and on this

be capable.—3 Salk. 21.—1 Com. 360.—2 Stra. 891, 1111.

English act the order has been determined to be, and so on our act: 1. To the husband on his wife's estate: 2. To her on his: 3. If no husband or wife, to the children, sons or daughters of the whole or half blood: if no children, then to the next of kin, as father or mother, and after them uncle, aunt, or cousin: lastly to a creditor of the deceased, or to any other person at the judge's discretion; but by our act, this other person cannot have administration till the creditors shall have refused. But this does not extend to goods the wife deceased had as executrix to another husband, administration on his goods must go to his next of kin; and administration goes to the son before the father, though in equal degree. Where there is a brother and a sister of the half blood, administration may be granted to her, for she is in equal degree of kindred; but if married, then to the brother, and not to her and her husband. To a *feme covert*, if next of kin, and if she refuse, to her husband; and though grandfather and uncle be in equal degree, the former has the preference.

§ 11. The next of kin are found by the rules of the Civil law, including relations both on the paternal and maternal sides, who are to have the benefit of the statute of distributions. But brothers and sisters exclude grand parents, though in equal degree. The grandmother is nearer than the aunt, for aunt and neice are related only in the third degree. Brothers and sisters are nearer than grandmother, and aunt than great grandmother. It is said, administration of the intestate's goods may be granted to his wife or next of kin, or of part to one, and of part to the other, but of hers must be to the husband; but one entire debt cannot be divided. Part to one, not our practice.

§ 12. By this act it is enacted, that when any executor or administrator shall reside without the limits of this state at the time of taking on him the trust, or shall afterwards remove out, and shall neglect or refuse, after due notice from the judge of probate, to render his account and make a settlement of the estate with the creditors, legatees, and heirs, or their legal representatives; or when any executor or administrator shall become insane, or otherwise incapable of, or evidently unsuitable to discharge the trust, the judge of probate is authorized to grant administration with the will annexed, or otherwise, to such person within the government, as he shall judge meet; and the administrator so appointed to have the same power, and to do the same duty as if the former administrator or executor were dead.

§ 13. And when the executor is under twenty-one years of

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1 Wils. 168.
—2 Bl. Com.
Chris. Notes
78.—12 Mod.
622.—4 Co.
51.—12 Mod.
618.—Toller
L. of Ex'rs.
118, 122.—
1 Com. D.
343, 360.—
1 Salk. 28.—
12 Mod. 618.

2 Bl. Com.
Ch. Notes 78,
Evelin v.
Evelin.—
12 Mod. 624.
—12 Mod.
623.—Salk.
37, Fawtry v.
Fawtry.

Mass. Act,
Feb. 6, 1784,
A. D. 1818.
See a. 13, s.
22, Absent
Executors
&c.—2 Mod.
204, Smith v.
Tracy. Dis-
tribution is
made equally
among child-
ren of the
whole and
half blood.
See Watts v.
Cooke, so
decided in
the House of
Lords, Ch. 17.
The Surro-
gate has dis-

cretionary power to choose an adm. from those who are next of kin to the intestate, and may grant sole administration to one of them, 2 Caines' Ca., Ch. 143.

CH. 29.
Art. 2.



age at the time of proving the will, administration may be granted with the will annexed, during the minority of such executor. So if an executor refuse the trust.

§ 14. And "when a *feme sole* shall jointly with one or more persons be appointed executrix or administratrix, and after such appointment, during the life of the other executor or administrator, marry, such marriage shall not make the *baron* an executor or administrator in her right, but shall operate as an extinguishment or determination of such woman's power and authority," and the other may proceed as if she were dead.

§ 15. "And the executor of an executor shall not in consequence thereof become an executor of the first testator; but in every such case administration may be granted" on his goods and estate not administered on, with the will annexed, "to such person or persons as the judge of probate may think fit." So administration may be granted to two, and if one dies, the survivor is sole administrator, or on condition, or till one returns, by the English law.

§ 16. So if there be a doubt who ought to be administrator, or there is a dispute about the will, administration may be granted during such absence or *pendente lite* of necessity, and such administrator may bring actions. This was decided on a writ of error after three arguments.

§ 17. In this case it was decided, that if A receive administration in another state, as at Hartford in Connecticut, he cannot by virtue thereof sue or defend in the courts in this state. By Mass. act, Feb. 6, 1784, sect. 19, we avoid the very litigated point in England, whether an executrix marrying can administer without her husband's consent; but 1 Cranch 259, agrees with Goodwin v. Jones. Administration in a state is void in the District of Columbia; Fenwick v. Sears' administrators, and 3 Day's Cases 74, 303, agree with Goodwin v. Jones. The case in Kirby 270, was decided on immemorial usage in Connecticut; so had been the usage in Massachusetts till the decision in Goodwin v. Jones, and Morrill v. Dickey, 1 Johns Ch. R. 153.

ART. 2. *Executors, how appointed &c.* § 1. An executor is one appointed by the testator in his will, and has it when proved committed to his care to execute. He represents the testator and is bound by his bond or contract, though not named in it, and if a contract or promise be made to the testator, his heirs or successors, his administrator or executors shall have it; and if a payment be made to an executor under a forged will regularly proved, the debtor is discharged.

§ 2. He is complete executor before probate for all purposes but of bringing actions. He may release and be sued,

2 Vern. 514,
Hudson v.
Hudson.—
1 Rol. 908.

Stra. 917,
Woolaston v.
Waller.—
1 Com. D.
362.

3 Mass. R.
514, Good-
win v. Jones,
contra 4 Dal-
las 292, and
Kirby 270.—
2 Bl. Com.
503.

3 Wood's
Con. 102.—
Fearn 308,
309, Allen
adm. v. Dun-
dass—3 T. R.
125, 133.—
2 Phil. Evid.
289, 299.

1 Salk. 108,
Wakeford v.
Wakeford.—
4 Salk. 163.—2

Bl. Com. 503.—5 Co. 28.—Stat. 1783, C. 24—Stat. Feb. 24, 1818.

and alien goods in England. Here if he does these things, as release and alien goods, and afterwards gives bond and proves the will, the probate relates back to protect these acts, but if not proved, they must be acts in his own wrong. If several executors be appointed, none can intermeddle but such as give bonds. If no objection, a will may be proved by one witness.

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ART. 2.

§ 3. *Who may be appointed executors.* All persons may be executors who can make wills, and many more; an infant may be an executor, though he cannot administer till he is twenty-one years of age, as above. So a *feme covert* may be executrix, but not jointly with others, as before; she must sue and be sued with her husband. So one outlawed may sue as an executor. An *alien* may be an executor or administrator, and even an *alien enemy*; but idiots and persons *non compos mentis* cannot be executors or administrators, for they cannot execute the trust. By the law of Virginia an executor cannot act till he has given bonds.

Imp. 46, 47.—
Co. L. 128,
129.—Cro.
Car. 9.—Cro.
El. 142.—Salk.
36.—2 Bac.
Abr 376.

1 Cranch 259.
—3 Cranch
315.—
5 Cranch 360.

§ 4. *Their duties by statute.* Executors, by this act, must prove the will within thirty days after the testator's death, and cause it to be recorded in the probate office, in the county where he last dwelt, and signify his, the executor's, refusal or acceptance; and for his neglect he forfeits £5 a month; and if the executor refuse the trust, the judge must "commit administration of the estate of the deceased, *with the will annexed*, unto the *widow or next of kin*, to the deceased, or to one or more of the *devisees*, or in case of their refusal, to one or more of the principal *creditors*, as he shall think fit." And a power accompanied with an interest, vests in the executors and administrators. *Kellogg v. Williams*. Liable for not proving a will, Ch. 148, s. 10, s. 5, and how.

Mass. act.
Feb. 6, 1784,
sect. 16, and
A. D. 1818.

Kerby 316.

§ 5. *Executor in his own wrong.* By the same section it is enacted, "*If any person shall alienate or embezzle any of the goods or chattels of the deceased person*, before he or she have taken out letters of administration, and exhibited a true inventory of all the known estate of the person deceased, every such person shall stand chargeable, and be liable to the actions of the creditors and other persons aggrieved, as *being executors in their own wrong*." The jury must decide if the facts be proved: but what acts make this executor, is a question of law. When one is executor of his own wrong by reason of a fraudulent deed, see Fraud, post.

See post, art.
6, and post,
Frauds, also
43 El.—
Mass. act,
June 20, 1794.
Post, Insol-
veney.
2 T. R. 97,
100, Pagget
v. Priest.

§ 6. *By the same act executors must give bond*, which enacts that "every executor named in a will, hereafter to be proved, shall give bond to the judges of probate, with sufficient surety or sureties, to return upon oath, a true and perfect inventory of the testator's estate into the probate office,

Sect. 17, and
act of A. D.
1818, in-
cludes real
estate and
rights and
credits.

CH. 29.

Art. 3.



Sect. 17.

Cro. El. 377.

—1 Com. D.

329.—Went-

worth 86.—

4 T. R. 521.—

1 Bos. & P.

293.—

8 Johns. R.

126. Battoon's

case.

The probate

court must

appoint the

admr. to sell

real estate, 4

Day's Ca.

137. His ac-

count must

state items,

&c. ib.

Insolvent act,

June 15, 1784.

Mass. act,

Mar. 4, 1784.

See Ch. 115,

a. 10, s. 11, 14.

Ch. 8, a. 5,

A. D. 1818,

Feb. 21.

14 Mass. R.

500.—4 Mass.

R. 354.

within three months, and to render an account of his proceedings therein," as administrators must do, unless the executor be *residuary legatee*; and then he may give bond to pay "the debts and legacies of the testator."

§ 7. And by the same act, "any executor being a *residuary legatee* may bring an action of account against his co-executor or executors of the estate of the testator, in his or their hands, and may also sue for and recover his equal and proportionable part thereof." And the said act of March 9, 1784, extends this last clause in substance, to co-administrators to recover part by action of account, if the other administrator get into his hands too much of the estate, and refuses to pay debts.

§ 8. Before this act, executors gave no bonds to account. Executors and administrators have the property of the deceased's goods by relation from the time of his death, but cannot devise them, nor can they be taken in execution for *their own debts*, unless they treat them as *their own*.

§ 9. Taking out administration makes all acts legal, though before tortious; but will not defeat a suit *before* commenced against the deft. as executor *de son tort*.

ART. 3. *Rights and duties of executors and administrators.*

§ 1. These are generally expressed in the statutes above cited. But some particular cases deserve further attention. By the law of Massachusetts, any executor, who does not *join in proving the will* and giving a bond as above, has no power to intermeddle in the estate. By the same law, an executor or administrator may *retain* for his own debt, due him from the estate, when it is sufficient to pay all debts. Where not so, he can, by reason of the insolvent acts, come in only for his share. Nor is there by our law, any preference of debts, except *funeral charges, debts to government, and those becoming due in the deceased's last sickness*. A judgment debt is not preferred to a simple contract debt. Also, in practice, on the same statute law, the executor or administrator usually has his *reasonable allowance* for his time and trouble in settling the estate, made to him by the judge of probate.

§ 2. Also, by statute law the executor or admr. has power by the mere form of leave of court, to sell even all the real estate, for the payment of the deceased's *debts and legacies*. And by the same act, if by neglecting to raise money out of the estate, or to apply what he has in his hands, the deceased's real or personal estate is taken in *personal* execution, the same is deemed waste in such executor or admr. Also, by this act he may sell even all the *real estate*, and *put the proceeds at interest*, if the judge of probate and the court think fit. The opinion till lately was, that it was the natural consequence of these powers and duties, for the executor or admr. to have

judgment to recover any part of the *real estate*, in order to be enabled thus to dispose of it; but the law is now viewed as altered. CH. 29.
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§ 3. By another act, he has the same power over *real estate mortgaged to the deceased*, that he has over a *pledge of personal estate*, and a like power over such *real estate*, as he, the executor or admr., shall *take in execution for the deceased's debts*, except where either must be sold to pay debts; then there must be leave of court, as above; and if he takes land for a debt, he becomes siezed to the use of the widow and heirs, &c. of the deceased and these lands are to be distributed as *personal estate*. Mass. act,
Feb. 11, 1789.

§ 4. Another consequence has resulted in practice, and in some measure necessarily, from these provisions: that is, for the executor or admr. to have possession for a time, of the real estate (as well as the personal) of the deceased at a reasonable rent. This rent he is charged with in his account by the judge of probate; and in case of any dispute about it, the law enables the judge to appoint commissioners to ascertain the amount of this rent. But only the executor or admr. can have power so sell *real estate* on license of court; a sale by a stranger is void.

§ 5. These and other *statute* provisions in Massachusetts, and the practice naturally growing out of them, form quite a complete system of probate laws, to all general purposes; whence, as relative to these subjects, the English statutes and practice in probate and chancery courts are excluded. Some English decisions and precedents, however, will apply here, as being very useful explanations of our laws (as they are often worded as the English acts are on these subjects.) And in several cases of less importance, these English decisions are a part of the law of the land; because they are on points, on which our statutes and practice are yet silent; or to which at most, they very remotely have reference. Some of these may be here noticed. Appeal from probate decree, and held an admr. cannot charge in his account of administration, the expenses of supporting a minor child. Decree reversed. 12 Mass. R.
503.

ART. 4. *English authorities adopted here, &c.* § 1. Where administration is granted to a wrong *person*, it is only *voidable*; where in a wrong *county*, it is *void*: so when granted to one when it should be to another, the acts of the *former* are good; but when granted to one, when there is a *lawful executor*, such admr.'s. acts are void. So if there be a will though concealed. And an administration repealed, does not avoid acts done under it. 8 Mass. R.
131, Brewster v. Brewster.
1 Esp. 289,
290.—Bul. N.
P. 141.—3
Salk. 22.—1
Com. D. 355,
356, 360, 364.
—6 Co. 19.—
2 Lev. 183.—
2 Esp. 337.

§ 2. By the English law, if a feme executrix marry A, and they get judgment for a debt due to the testator, *and she dies*, 2 Bac. Abr.
386.—1 Salk.
328.

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8 Co. 270,
Needham's
case.—3 Salk.
306, 163.
Salk. 299,
Wankford v.
Wankford.

Hob. 10 —2
Show. 401.—
Plow. 184,
185.—3 T. R.
558.—Jones
345.—Cro.
Car. 373.

Co. Lit. 264.

Co. Lit. 264.
—1 Salk. 299.
—8 Co. 136.
Cro. El. 114.

8 Co. 136.—
J Salk. 306.—
1 Sid. 79.—
3 T. R. 559.

1 Com. D.
326.

8 T. R. 168,
Dean v. New-
hall.—5 East
147.

not the husband, but the *admr. de bonis non of the testator*, shall have execution or sue the judgment. And so did we formerly practice, at least in some cases, but lately it has been held there is no privity between the parties.

§ 3. *Assets*. If administration be granted to the *debtor*, it *does not discharge the debt*; but he must account for it in all cases. But if the creditor make the debtor his executor, it is a release in law to the debtor, of the debt: for it is his own act. Yet the debt is *assets*, and making him executor does not give him the debt as a *legacy*, but is a *payment and release*, and *he holds the debt as assets*, as so much *being in his hands as the property of the deceased*; and the reason is given by Holt C. J. Salk. 306, "that when the *obligee* makes the *obligor* his executor, though it is a discharge of the *action*, yet *the debt is assets*," as "if H be bound to J. S. in a bond of £100, and then J. S. makes H his executor; H *has actually received so much money, and is answerable for it*. And if he does not administer so much, it is a *devastavit*." The action is released, but the duty remains.

This seems to be the true explanation of the scores of dictums and decisions in the books, "that if the creditor make the debtor, or one of several joint and several debtors, his executor, it is a release, and extinguishment of the debt."

It is a mere discharge, or rather suspension of the *action only*, while it would be absurd for the person representing the creditor, to sue himself as the debtor, or while as such person it may be presumed he has in his hands the amount of the debt, as owing it as debtor, or one of the joint, or joint and several debtors, in his own right, to himself in *auter droit*. But what is the effect of this discharge or suspension of the *action*? A mere suspension of the *action only*, not of the *right*, while the reason of the suspension continues. If a debtor be appointed *admr.* this suspension exists, as he cannot as *admr.*, sue himself as the real debtor. Yet, if before the debt be paid, he be removed as *admr.* as he may be, the debt must be lost to the estate of the creditor, if his subsequent *admr.* put in the place of him removed, cannot sue the debtor. But thus to sue him is necessary, reasonable, and common practice. A personal *right* once extinct or suspended is gone. But a right may remain and an action recur, though suspended for a time, as every action is every *Sunday*, as no debtor can be sued on that day. Nor does this construction exclude any intention there may appear to be in the will, to give the debt as a legacy to the debtor; and then it is not *assets*.

§ 4. The obligee may sue one of two joint and several obligors, though he covenant with the other not to sue him.

§ 5. Hence a debtor made executor must account for his debt to the residuary legatee &c. The obligee made the obligor executor, who accepted by administering, and died before probate: this is a discharge. Making the debtor executor during A's minority, does not discharge the debt. 1 Ld. Raym. 605, *Carveth v. Phillips*; 2 Bac. Abr. 280; 11 Mod. 38 to 42, case of Wankford above.

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§ 6. Two executors join and give a release of a debt due to the testator's estate, but one only receives the money. The English books decide, that both are liable to the testator's creditors; but only he who receives the money is liable to his legatees. How far this principle holds here, is not decided. The one not receiving need not join.

Salk. 319,
Churchhill v.
Hopson.

§ 7. After one has generally admitted himself to be administrator, he cannot plead he was a temporary one only, and his administration is ended; but one sued as administrator generally, may plead he is such only during A's minority; but he must also shew A is still under age and administration continues.

1 Ld. Raym.
265, *Sparks v.*
Crafts, & 408.

§ 8. Where lands are devised the executor before probate of the will may lease them. The executor's power arises from the will, and not from the ordinary; and he may declare before probate, Cro. Jam. 15. This was a devise by implication, being a devise to his daughter Mary after the death of his daughter Betty, by which the deviser intended her a life estate. The will alone gives the executor a good title to the goods. Probate is necessary only to enable him to sue for debts, and 1 D. & E. 480.

2 W. Bl. 694,
Bendest v.
Somerset—
5 Burr. 2609.
—Lofft. 81.

§ 9. *As to leasehold estates.* Where the debt is charged as executor, judgment must be *de bonis testatoris*, though he might have been charged as assignee in the *debet* and *detinct*, because of his taking the profits himself: 2. Wherever the rent is of more value than the land the executor may plead it; for then he is accountable in no way for the term to the testator's creditors, or to his legatees; and as to tenancies from year to year, as long as both parties please; and if a tenant dies intestate, his administrator has the same interest the intestate had, and the lessee of such an administrator may declare in ejectment on a term for years. If an executor sell, surrender, or merge a term for years, it is still assets, Toller 141, 142.

Salk. 316,
Buckley v.
Pish.3 D. & E. 13,
Doe v. Porter.

Lofft 68.

§ 10. *Assets.* If an executor pay interest on the testator's debts, it is *prima facie*, though not conclusive evidence of assets, 5 D. & E. 8, n. And if the executor or administrator be sued for rent, he may plead no assets; and that the rent is of more value than the land or premises. Estates *per auter vie* are assets only for paying debts, not legacies, in England; nor is it distributable, but by our law it falls into the mass of the pro-

See Assets.
1 Salk. 297,
Billingshurst
v. Speerman.
—2 Salk. 464.
1 Ld. Raym.
96.

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1 Ld. Raym.
589.—Salk.
310, Roch v.
Leighton.—
5 D. & E. 6.
—3 East 2, 7,
Hope v. Ba-
gue & al. and
7 D. & E.
453.

perty of the deceased. Judgment against an executor on confession or default admits *assets*, and on *devastavit* he is estopped to say he has not *assets*, and the jury also is estopped to find no assets. Administrator's promise to pay the intestate's debts is *nudum pactum* if no *assets*. The plt. got judgment against the testator, and judgment of execution in *scire facias* against his executors, the debts.; then sued them on this last judgment in debt in the *detinet*, suggesting a *devastavit*. Held, first, the executors being conclusively fixed with *assets* by this last judgment, the issue on *non detinet* lay on them to prove the due administration of such assets. A declaration in the *detinet* only, against an executor is cured by verdict, but if not, the plt. on such a declaration may take judgment *de bonis testatoris*; that is, may waive the better judgment *de bonis propriis*, and take the less *de bonis testatoris*. By our law, after such judgment against executors or administrators the deceased's estate may be rendered insolvent, and then such judgment will be paid in proportion; hence, not conclusive for the whole. Lands in Georgia *assets* in the hands of the executor, and may be followed by the creditor in the hands of the devisees &c.

2 Cranch 407.

3 D. & E. 125,
Allen, adm. v.
Dundass.

§ 11. *Payment on a forged will &c., or administration repealed &c.* seems to be now well settled, that *bona fide* payment in such cases by debtors of the debts to the deceased, are valid. As where a will was forged and proved, and a debt was paid to the executor by a debtor to the intestate. Held, he was discharged, though the probate was afterwards annulled and administration granted to the intestate's next of kin. While the probate remained, this will could not be impeached, and the executor had a right to the payment, and a court of law would have enforced it, and per Buller J. the probate is a judicial act. The payment of a debt to an administrator *de facto* is valid, though the administration be afterwards repealed and administration granted to another. Assets in *chores in action*, see Ch. 24.

8 East 187.

12 Mass. R.
399, Royce v.
Burrill & al.

§ 12. *The heir is not liable while the executor or administrator is liable.* 2. No action lies against the heirs before letters of administration be granted, and when they may be granted. By our laws, the executor or administrator while he exists, has in his hands the whole estate of the deceased if wanted for fulfilling his contracts: 3. It is only when the creditor can in no way sue the administrator, that he has a right to sue the heirs.

Mass. Acts,
Feb. 14,
1789. Feb.
14, 1791.
Feb. 14,
1793.

§ 13. By these acts executors and administrators must be sued within four years after they give bonds in the probate office for debts the deceased owed, suable within said four years, provided the executor or administrator give and post notice

and file evidence thereof in the probate office, as the said acts direct : but these acts do not affect legacies, bequests, or annuities. And if a contract of the deceased do not become suable within the four years, but will absolutely become due after the expiration thereof, the contractee may file such contract in the probate office any time within the four years, and the executor or administrator may retain assets to pay it, unless the heirs or devisees of the estate will give security to pay it. And by the fifth section of said first act, if any covenant of the deceased be not in full force during said four years, the contractee therein not having so filed the same, may sue those who inherit the estate of the deceased or the devisees thereof, if the contractee's claim "be made within one year from the time of its becoming due."

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1 Wash. 62.—
Office of Ex.
59.

Assets, what. Trees not severed and their fruit, as apples, pears, &c. go to the heir ; so grass growing, though fit to be mowed. But corn, though growing, and all things of the kind, produced annually by labour and cultivation, go to the executor, as also hops, saffron, hemp, &c. ; but they go to the devisee of the land ; but a devisee of goods, stock, and moveables takes them. The executor or administrator is also chargeable with, as *assets*, all chattels real and personal he receives from the deceased ; as terms for years in lands, houses, mortgages, and debts thereby secured, until the equity of redemption is foreclosed or released, and the mortgagee is in possession. And if not mentioned to whom payable, is payable to the executor or administrator, and not to the heir, because originally derived out of the personal estate, 1 Vin. Abr. 148, and if payable to the heir or executor, and before the day is paid to the heir, as the mortgagor may elect, yet the executor has it, 2 Ventris 351 ; Off. of Ex. Supp. 47 ; Harg. Co. Lit. 210 ; 2 Ch. Ca. 187 ; 1 Vern. 412. And if the mortgagor neglect to redeem, the mortgagee's heir is decreed in equity to convey the mortgaged premises to the executor ; but otherwise, if the mortgagee himself gets an absolute title, as then it appears he meant to turn a chattel into a real estate, 1 Eq. Ca. Abr. 273, 328. But if his heir get such a title, it avails him not in equity, 2 Vern. 193 ; but the heir has the land mortgaged whenever it appears the mortgagee intends to make it real estate, 1 Vern. 271, 581 ; 2 Burr. 969, or means his heir shall have it.

Cro. Car. 515.
—6 East 604.
—8 East 339,
West & al. v.
Moore, Ch.
76, a. 6, s. 4.
—Toller's
Law of Ex-
ecutors 139
to 200, 409,
&c.—2 Pow.
on Mort. 682.
—Fonbl. 255.

2 Ch. Ca. 60,
185.

Real chattels, as terms for years in houses, lands, commons, estovers, and other moveable goods, go to the executor or administrator, and lands devised to an executor for a term of years to pay debts are *assets*, and so are leases *assets* to pay debts, though he assents to the devise of them. So a lease for years determinable on lives is a chattel and *assets*. So a

Toller's L. of
Executors
140, 145.—
2 Bl. Com.
386.

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3 D. & E. 13.
—6 D. & E.
296.

lease from year to year, as long as both parties please, is a chattel and *assets*, and with the leases for years go animals *feræ naturæ*, in which the deceased left property, as fish, doves, bees, &c. as belonging to the fish-pond, dove-house, bee-hive, &c. leased, 3 Bac. Abr. 57; but leases for years are *assets* only for as much as they exceed in value the rent, id. The reversion of a term vested in the executor is *assets*, 3 Bac. Abr. 58; 11 Vin. Abr. 240. And if A, as executor, have a term, and he purchase the reversion in fee, it is still *assets*, though merged; so, though the lessee's executor surrender, 1 Co. 87. So where A seized in fee, devised to B for thirty-one years to pay debts and appointed B executor, and the fee descended on him and the term merged, yet it was adjudged in *esse* and *assets*, as to creditors and legatees, 11 Vin. Abr. 229. So A has a term for years in his wife's right as executrix, and he buys the reversion, and the term merges and is extinct as to her, though she survive, yet it is *assets* in her hands as to strangers, 11 Vin. Abr. 236; 2 Vern. 213, 298; aliter as to terms for years erected for specific purposes. As if A reserve a rent in a lease for years and die, the rent in arrear at his death goes to his executor, 3 Bac. Abr. 63, as an action has accrued for it in the testator's life time.

See Emble-
ments, Ch.
76, a. 6.

Emblements go to the executor or administrator as *assets*, and all property a lessee for years has in trees but his fruit &c. goes to his executor or administrator as *assets*, but these must be severed during the term, Com. D. Biens.

See Fere
Naturæ, Ch.
76, a. 9.

Vegetables, animals feræ naturæ are *assets* in the hands of the executor, 2 Bl. Com. 390, 392, 393; and the minutest property in the deceased in his animals, in point of value goes to his executor, 3 Bac. Abr. 57; as house-dogs &c., or if kept only for pleasure or whim, as parrots &c. Vegetables, as fruit, plants, or trees, when severed, are *assets*, as grass mown, and apples gathered; so manure in heaps, not spread, 11 Vin. Abr. 175; but *quære*, as to manure for the use of the land. All the deceased's moveable property is *assets* wherever situated, Toller 154, though at sea or abroad, and are viewed as in possession of the executors, as they may have trover in their own names where the deceased had an absolute property in them at his death, hence his bond in trust.

2 Bl. Com.
389.—7 D. &
E. 358.—
Salk. 71.—
3 Bac. Abr.
58.

2 Dall. 291.—
4 Dall. 450.—
An admr. has
trespass for
entering on
the intestate's
lands, and
burning his
mills in his
life-time.
1 Day's Ca.
180.—2 Dall.
223.

§ 14. *American cases.* The sale of lands by executors, under a power to sell for the payment of debts, is good against creditors; but not if the power be to sell for the payment of legacies. And in such case for paying debts, the purchaser takes the land discharged from the lien of judgments, as well as other debts of the deceased. And on a general principle, whenever a part of the deceased's estate is *legally* sold by his executor or administrator by order or license of court, such part must legally cease to be a part of the deceased's estate, and

the purchaser's title must be complete and absolute. But it may be well doubted if a court can authorize the executor, administrator, or other, to sell part or all the deceased's estate to pay *legacies*, while it is liable to pay his debts. Lands were devised to be sold, not saying by whom, and the proceeds divided. Held, a sale made by the survivor of two executors was valid.

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§ 15. If a creditor takes the executor's or administrator's bond, he discharges the old debt due from the estate of the debtor deceased. 1 Dall. 347 &c.

§ 16. Where the testator wrongfully possessed himself of an estate, held, *indebitatus assumpsit* lay against his executors to recover the mesne profits of it. Though the party injured might have had trespass against the testator, yet he had a right to waive the tort, and claim the profits, as to which the testator became indebted, and the right of action survived against his executors.

2 Dall. 176. A testator incurs costs in defending against a malicious suit, his executor cannot have case for these costs, 2 Day's Ca. 286.

§ 17. In New-York, the deft. executor or administrator must defend himself on the first suit, or he is concluded. As where there had been a former judgment by default, against executors, and on *scire facias* returned *nulla bona*, held conclusive evidence of a *devastavit*; and then on a plea of *plene administravit*, the burden of proof is on the deft. This seems to result from the nature of the plea every where; and very clearly wherever this plea of *plene administravit* is allowed in common form. Any defence founded in a want of assets ought to be made in the first suit, and before any judgment in the case against the deft. In Massachusetts there is in fact no such plea. In Pennsylvania, on a want of assets pleaded in an action against an executor or administrator, brought by a residuary legatee, auditors will be appointed *extempore*, to inquire and hear &c. In Virginia, if the deft. die after office judgment, on *scire facias*, his administrator cannot plead *plene administravit*. And on the issue, on this plea the jury must find specially, the amount of the assets the executor or administrator has, to enable the court to give judgment. 5 Cranch 19; Fairfax v. Fairfax. The English law as to *assets*, and *preference* in payment of debts by executors and administrators, seems to be preserved in several states *in toto*, or in part, as in Pennsylvania, &c.

1 Johns. Ca. 276, Platt v. Admr. of Smith. Debt does not lie against the admr. of a sheriff for an escape in the lifetime of the intestate, Caines' R. 124.

§ 18. On letters of administration granted in England, or in any foreign country, an action cannot be supported in the District of Columbia, or in our Federal or State Courts. See Goodwin v. Jones. a. 1, s. 17, and cases there cited. See next head.

1 Dall. 164. 6 Cranch 184. M'Knight v. Craig's admr.

2 Dall. 260.

§ 19. Administrations granted in other states. See a. 1, s. 17. Assumpsit on several notes made to the plt's. intestate, admr. v. citizen of Connecticut. 1st. plea, *non-assumpsit*; lord.

3 Cranch 319, Dixon v. Ramsey.

11 Mass. R. 256, Stevens, admr. v. Gay-

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2d. in bar, resulted in an issue to the jury, whether the intestate when he died, had his residence in that state—found for the plt. ; 3d. plea alleged that after the intestate's death, and before the commencement of this action, and before the plt's. appointment as administrator &c. by the judge of probate, for the county of Berkshire, administration was granted to the deft. L. B., in Connecticut, on the intestate's estate, and states how, and there gave bonds &c., and inventoried the debt demanded &c. Plea held good: Also, held, it is not material in such plea, to aver the deceased had his home in Connecticut ; nor is the time of granting the respective administrations material. And if in fact the intestate had his home in Connecticut, his effects must be distributed here, according to the laws of Connecticut, or transmitted thither for distribution by the administrator there. In this case several important points were settled. 1st, Granting administration is not confined to the state or county in which the deceased last dwelt : 2d, Administration granted here &c. is merely *ancillary* to the principal administration granted where he last dwelt : 3d, But not necessary this precede : 4th, The distribution is according to the laws of the place where he last dwelt, or had his *domicil*, at his decease : 5th, The administrator appointed in a state, must collect the debts of the debtors, in it residing : 6th, The appointment of the debtor (def't.) administrator in Connecticut, to the creditor, *discharged the action* given originally by the contract, and is a bar to the present action ; especially as the deft. acknowledged the debt in his inventory in Connecticut.

11 Mass. R.
313, Langdon
& al. adms.
v. Potter.


Debt on judgment of Massachusetts S. J. Court, commenced in the Common Pleas, by administrators appointed in Connecticut. *After issue joined*, def't. objected the plts. had no letters of administration but those granted in Connecticut. Held, this fact could not be decided on such objection, but must be pleaded in bar, on proper leave granted. The general principle is, that all rights to the testator's personal estate are to be regulated by the laws of the country where he lived ; but suits for those rights must be governed by the laws of the country in which the action is brought. 3 Cranch 319, Dixon's case.

12 Mass. R.
199, Winslip
v. Bass. & al.

§ 20. Held, 1st, naming a debtor executor, and his accepting does not extinguish the debt ; 2d, his probate bond covers it ; hence 3d, his declining to account for it, is no cause of removal ; 4th, the judge of probate has power to remove any one of several executors, for good cause, on the statute of 1783, ch. 24, s. 19, and the rest execute the trust.

12 Mass. R.
368, Sears,
agent, v. Dil-
lingham & al.

§ 21. Held, 1st, an executor cannot refuse the trust after he has proved the will and given bond ; 2d, he is not a witness to the execution of the will, or the testator's sanity, after

accepting the trust, his liability to costs is a good objection ; **CH. 29.**
 3d, if he be one of the three witnesses, the will may be proved **Art. 5.**
 by the other two, as he was a competent one when he attested it, and is incompetent only by accepting the trust. 

ART. 5. When is the action suspended or not ? § 1. By **9 Co. 36, 42,**
 our law, the executor must accept and give bond, or refuse. **Hentois'**
 If he refuse, he is as if he never had been appointed, and **case.—3 T.**
 may be sued or sue accordingly ; for one is no more executor **R. 559.—**
without his assent, than one is obligee or obligor in a deed, **Jones 345.**
without his assent ; and by our law, after an executor has refused, he cannot come in.

§ 2. But if the person appointed executor, accepts the trust **Sullivan, 113.**
 and gives bond, then he is executor ; and if executor of the **1 Salk. 299,**
 creditor, cannot bring *assumpsit*, or any other action *against* **309, Wank-**
himself, as the debtor, or against himself and others as debtors **ford v. Wank-**
 on a joint, or on a joint and several contract ; or unless he **ford.—1 Salk.**
himself be insolvent against one of them on the latter contract. **163.—2 Bac.**
 And this also is the administrator's case. So if the creditor **Abr. 278 to**
 make the *debtor and another* executors, for they must join, and **281.**
 they cannot sue *one of themselves*, as this debtor. Administrator **pendentu tite** as to a will, may bring actions. **2 Stra. 219.**

§ 3. Assumpsit and eight counts on the promises of the **3 T. R. 557,**
 said Woodhouse, and a ninth count on the promise of the deft. **560, A & J.**
 as executor. To the said eight counts the deft. pleaded that **Rawlinson v.**
 the testator made his will &c. ; and appointed *the deft. and said* **Shaw, exr. of**
J. Rawlinson, (one of the plts.) *and three other persons joint* **Woodhouse.**
executors &c. To the ninth count, that the promise (if made **at all**) was made by the deft. and J. Rawlinson, and said three persons, and not by the deft. alone, the plts. replied, that J. Rawlinson never proved the will of the said Woodhouse, and never administered, &c. And as to the last plea, that the promise was not made by the said deft., the said J. Rawlinson, and the said three persons ; demurrer to the first plea, and joinder. Judgment for the plts. Lord Kenyon said the argument was for the deft. ; "that if A owe B a sum of money, and choose to make him his executor, though B will not act, his legal remedy is extinguished." This could not be true ; otherwise, had J. Rawlinson, the creditor, accepted as executor to the debtor.

§ 4. If the obligor make the obligee and another his executors, and the obligee renounce the executorship, he may sue the other executor ; for he alone is executor, and the obligee is as he was, simply a creditor. **Jones 345,**
Dorchester v.
Webb, recog-
nised, 3 T.
R. 559.

§ 5. A consented the deft. should have certain goods left by B, deceased ; and afterwards A administered on his estate, and held he could not maintain trover against the deft. **Carth. 104 ; 4 East 447.**
1 Salk. 296,
Whitehall v.
Squires.

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Art. 6.

Sec Art. 2,
ante.

5 Co. 34,
Read's case.
Swinb. 448.
—2 T. R. 97,
100, Pagget
v. Priest, 597.
Office of Exr.
171.—2 Bac.
387.

Cro. El. 102,
114, 120.—
Dyer 166,
255.—2 T. R.
587, 597, Ed-
wards v. Har-
bin.—2 Selw.
639.—4 East
441.
3 Mass. R
296, Thayer
v. Bond,
admr.—4
East 441.
Toller's Law
of Exrs. 364.
—Salk. 313.
Hob. 49, Ki-
ble v. Osbas-
ton.—1 Esp.
290.—2 Dyer
166, Stokes
v. Porter—
3 D. & E.
687.

5 Co. 31.—
Imp. 34.—
3 T. R. 688.
—Dyer 166.
—2 Bl. Com.
507, 508—
1 Esp. 289.—
Bul. N. P.
48, 91, 143.—
Toller's Law
of Exrs.

§ 6. A *stranger* is made executor with £50 legacy; he has not the *residuum*, but must account for it. *Matthews v. Court-hope*; 3 Salk. 82; 1 Wils. 285; 1 Stra. 568.

ART. 6. *Actions against an executor of his own wrong.* § 1. By our law he is one who *alienates or embezzles the goods of the deceased, before he takes administration and renders an inventory.* The first part of this provision is correct; the latter uncertain, for by the act he need not render an inventory till three months after he is appointed; yet in that time it is very often necessary to alienate some of the deceased's goods. The old books describe him as a person, who, without any authority from the deceased or the judge, does such acts as belong to the office of an executor or administrator. As if he possess and convert to his own use, the deceased's goods; or out of his assets pays his debts; sues for and recovers debts due to him; or does any act of acquiring, possessing, or transferring the deceased's estate; for by this only, can creditors know against whom to bring their actions; or when he takes and uses them. So by releasing debts due to the deceased, or by paying legacies out of his effects. So by taking a specific legacy without the executor's consent, by delivering too much to the widow, or by answering to an action against him, except *never executor.* So if the wife take too much apparel, she is executor in her own wrong. So one appointed to collect the goods of the deceased, if he sell even *perishable* goods, by express order of the judge; for he can give no such order. So if one claim to be and act as executor, even where there is a rightful one. So taking the deceased's goods under his bill of sale that is void. So if one die intestate, and A *takes his goods and uses or sells them*; otherwise, if this be after there is a lawful executor or administrator, for when there is such, the deceased's goods are assets in his hands, and A's taking them &c. is a *trespass*, and he is to account. But though there be such an executor or administrator, yet if A take the goods, claiming *as executor*, receive and pay debts, and act *as executor*, then for such express administration, *as executor*, he is one of his *own wrong.* So if there be a *rightful* executor, and before he proves the will, A takes the goods &c., so receives a debt, this makes him executor of his own wrong.

§ 2. In all these and many other cases, where one is *executor of his own wrong*, he is liable to be sued in *assumpsit* and other actions, *as the executor of the last will and testament of* —; and there is no other form. And "he is chargeable with the debts of the deceased, so far as assets come to his hands." And as against creditors, generally, he shall be allowed all payments made to any other creditor, and allowed in mitigation of damages; and generally is liable to the value of the goods he takes; but he cannot retain for his own debt;

not even by consent of the *legal* executor, given after an action is brought by a creditor; but on taking administration he may retain. But this *executor of his own wrong* may avoid an action by delivering the goods before he is sued, to the legal administrator; but not afterwards. Lord Raym. 661; 1 Mod. 208; 1 Esp. 289; Stra. 1006.

§ 3. Or he may by taking administration himself before he is sued. But if previously sued, the *plt's.* writ shall not abate, Andrews' Reports 328; Sid. 76; 12 Mod. 441; he may retain if he pays a debt. How his taking administration purges all wrongs, Ch. 190, a. 4, s. 31.

§ 4. If the legal executor bring trespass against a *tort* executor, he may give evidence of the payment of just debts in mitigation of damages; yet the right of the action and the verdict must be against him, and if he pay a just debt with the goods of the testator, the rightful executor shall not avoid, but have an action against the *tort* executor, and recover so much as he has misapplied only.

§ 5. But he is not such executor or liable to be sued, if he merely take care of the deceased's funeral; or pays his debts or legacies, if out of his own money; or feeds his cattle, or makes an inventory; or repairs his houses in decay, provides necessaries for his children, and does other acts of mere kindness; nor if he comes into possession of the deceased's property by colour of legal title, though he has no complete title, 1 Esp. R. 335.

§ 6. But the *plts.* as creditors of W. Shore brought *assumpsit* against the *defts.* as his executors. Shore in his life time had goods in his cellar, and asked Porter, one of the *defts.*, to send a person to take care of them. Porter sent Payne, his servant, who sold beer as well *after* as before Shore's death by his order. Payne paid into Porter's hands the produce of the beer &c. sold after Shore died. Held, Porter is an *executor de son tort*, but that he would not have been liable, if before he was sued he had paid the money to the lawful administrator of Shore's estate; though his so paying it after sued would have been no excuse. In this case, Porter, without authority, by his servant sold Shore's beer after his death, and after his death, his order was void. But an *executor de son tort* cannot, after an action is brought against him by a creditor, discharge himself by delivering the effects to the rightful executor; 1 Salk. 318, Churchill v. Hopson.

§ 7. Assumpsit for work and labour done for the testator and money counts. Pleas, *non assumpsit*, and *ne unques executrix*, *deft. executrix de son tort* by intermeddling under power ended. As where C. Aldrich appointed A, B, and C, his executors, and died. A proved the will, reserving a pow-

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Art. 6.

Vaughan v. Brown, 3 T. R. 588.—2 H. Bl. 18.

12 Mod. 441, per Holt C. J. 471.—4 East 441.—3 D. & E. 588.—2 H. Bl. 18.—Swinb. 337.—1 Mod. 218.

2 Bl. Com. 507.—3 Salk. 161.—1 Com. D. 361.—Toller's L. of Ex'rs. 39 &c.

2 T. R. 97, 100, Pagget v. Priest & Porter, exrs.—1 Salk. 313.—1 Saund. by Wms. 266.—Peake's N. P. 86.

See 3 T. R. 587.—2 H. Bl. 18, Curtis v. Vernon.

4 Maule & Sel. R. 175, Coate v. Aldrich, exr.

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Art. 7.



Salk. 311,
House & al.
v. Petre.

Kirby 39,
Fitch v.
Huntington.

Kirby 391,
Tyler v.
Cook.

1 Caines' Ca.
in E. 96, Fur-
man v. Coe &
al.

1 Day's Ca.
426.

United States
Act, Sept. 24,
1789, sect. 31.
See Ch. 171,
a. 13, s. 15,
Replevin. A.
D. 1818.

Mass. Act,
March 4,
1784, sect. 10.
—Prov. Law
247.—Add.
Act. Feb. 26,
1813. A. D.
1818.

er for B and C to come in ; A gave a power to C and the deft. (sister to him and the testator) to act for A. She acted in administering the testator's estate till A died ; he left her and D and E, his executors, who proved his will. Deft. after A died continued to administer C. Aldrich's estate, consulting and acting under C's advise. She proved under a bankrupt commission a debt due to C. Aldrich's estate, claiming as executrix of A, so under his power as he was dead. Held, she was not executrix *de son tort* while A lived ; but was after his death, as thereby her power terminated, was not executrix of C. Aldrich as executrix of A, as there were surviving executors of C. Aldrich ; as if there be two executors and one proves the will and dies, the executorship survives to the other, but if he then renounces, the testator is dead intestate. And after one has proved it, till his death the other cannot renounce.

§ 8. *Administrator liable for interest &c.* on an insolvent estate after the average is struck, in his own right ; for it is his own fault he suffer it to accrue.

§ 9. If an administrator refuse to add to the inventory newly discovered estate, the creditor's remedy is on the probate bond, not to sue the administrator, where the estate is regularly proceeded with as insolvent, especially if such creditor has exhibited his claim, and had it allowed by the commissioners, though further estate is discovered and no average struck.

§ 10. *Executor &c. robbed.* Held, if an executor or trustee be robbed of money he received, he shall be allowed it on account, the robbery being proved, though the sum is only proved by his own oath ; and if dead, his executor or administrator may avail himself of the circumstance though it want the said oath. If the mortgagee assign the debt &c. no interest or *assets* pass to his executor or administrator, Crosby v. Brownson.

ART. 7. *In pending actions, when and how executors and administrators come in.* § 1. By this act of Congress it is enacted, that " when any suit shall be pending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plt., petitioner, or deft., in case the cause of action doth by law survive, shall have full power to prosecute and defend any such suit or action until final judgment." In the statute law of Massachusetts there is a like clause, from which this in the United States law was copied. There was a like clause in Massachusetts Province law, passed A. D. 1727. In this case executors and administrators come in and prosecute and defend actions, commenced by or against the deceased.

§ 2. In practice on these clauses several questions have arisen : 1. When is a suit depending in court? 2. What action survives? 3. Does it extend to administrators *de bonis non*? CH. 29.
Art. 7.

§ 3. As to the first point. In this action of *assumpsit* the plt. died before the action was entered, but after the writ was sued out. And the court admitted the administrator to come in and enter the action, and would have notified Gray by *scire facias* to come in and answer, but his counsel took notice. And it was held, the action is pending in court from suing out the writ. Did he die before the writ was served? Issuing the writ is the commencement of the action &c.

Cir. Court of the U. S. at Boston, June 1795, *Gar- diche v. Gray*

§ 4. In this case in the year 1793, there was a decision, that if the party died before the entry of the action, and after service the administrator might come in; and see 3 Cranch 193. The plt. died and his executor came in. He must produce his letters testamentary if called for, but not allowed a continuance.

3 Johns. Ca. 145, 149, Stone, adm. v. Pickman & al.—3 Cranch. 193, Wilson v. Codman's exr.

Upon this question of *pendency* there have been different decisions in England.

§ 5. In this case the court held, that where a writ issues out of one court, as Chancery, returnable into another court, as the Common Pleas, the suit is not pending in the Common Pleas &c. till the writ be returned there. But that where it issues out of, and is returnable into the same court, it is pending before the return or service. And in Croke it is said, a writ is pending as soon as it is sued out.

5 Co. 48, case of Littleton. —1 Cro. 671. —2 Cro. 11. —F. N. B. 140, Notes.—5 Bac. Abr. 218.—3 Wils. 58.—Far. R. 5.

§ 6. Second question. It may often be doubtful what action survives, not in any case of *actio personalis cum moritur persona*. This point rests on the common law authorities; and whenever the action dies with the party, as in all cases of *tort*, the executor or administrator cannot come in. See *Actio Personalis* &c. Ch. 7.

§ 7. Third point. It has been uniformly held, that if an executor or administrator die pending the suit, the administrator *de bonis non* cannot come in; for the statutes do not extend to this case, and even though he offers to come in. Remedy by a new statute, Feb. 1813, and A. D. 1818.

Mass. S. J. Court, Essex Nov. 1797, Swett, adm. v. Prince.

§ 8. The deft. may plead, that prior to suing out the writ, he settled with the plt. the debt. This is good as to time, for this suing out the writ is the commencement of the action, and the cause of the action must be alleged to have arisen before this suing out the writ; and if the declaration relate to the preceding term, and the cause of action be after, there must be a special memorandum, entitling the declaration at the time it was filed, 14 East 539; 18 Johns. 14.

3 Caines' R. 133.—2 Johns. R. 342, Bird & al. v. Carlat. 3 Johns. R. 42, Cheetham v. Lewis.—10 Johns. R. 110.

ART. 8. Several other cases decided on American statutes &c. § 1. In this case it was decided, that if an administrator

5 T. R. 6, Pearson v. Henry—Stra. 1144, post.

CH. 29. submit to an award, he does not thereby admit *assets*. And a
 Art. 8. general submission to an award includes a demand as execu-
 ~~~~~ trix, so as administrator ; see *Ellilson v. Cummins*. See *In-*  
 solvent head.

Mass. S. J.  
 Court, Wor-  
 cester 1782,  
 Divoll, adm.  
*de bonis non*  
*of Tulatt v.*  
*Com'rs. of*  
*Lechmore.*  
 Administra-  
 tor must ren-  
 der an inven-  
 tory of the  
 whole estate,  
 though claim-  
 ed by a third  
 person, who  
 may still try  
 his right,  
 Kirby 101.

Mass. S. J.  
 Court, 1785,  
 Essex, Sar-  
 gent, adm. of  
*Leveret v.*  
 Low, adm. of  
*Symonds.*

§ 2. *Change of property.* In this case *Lechmore*, the executor of *Tulatt* and residuary legatee, gave bond in the probate office to pay debts and legacies, and took into his hands the estate of *Tulatt*, his testator, and used it as his own. The court decided, that when he had done this he had administered on the estate, and the testator's cattle &c. had become the property of *Lechmore*, and so was changed. This was held, in this case in which *Divoll* had taken administration *de bonis non* on the estate of *Tulatt*, and brought this action of trover to recover the cattle in question as part of *Tulatt's* estate, not administered upon. On the same principle, where the administrator takes to his own account the personal estate in the inventory, and submits to be accountable for the amount of the inventory, he makes this personal estate his own.

§ 3. An administrator must pay interest on a distributive share. In 1778, *Low*, administrator of *Symonds'* estate, rendered it insolvent, and the judge of probate made an order of distribution thereon. *Low*, the administrator, paid some of the creditors but not all ; nor did he offer to pay *Mrs. Leveret* her part in her life time, or to the plt. her administrator after her death, but *Low* kept the paper money and brought it into court in this action on the clause in the Massachusetts depreciation act respecting trustees. The court decided, first, that *Low*, as the administrator of *Symond's* estate, ought to have tendered to each creditor his proportion according to the order of distribution.

Second. That the damages must be ascertained by the value of paper money when the order of distribution was made.

Third. That interest should be paid from the time of making the order of distribution, for then a certain sum became due and payable.

§ 4. There never has been a question in this state but that *assumpsit* lies by and against executors and administrators, and there is here no wager of law. And in declaring against an executor or administrator the plt. need not state assets ; and he is never chargeable beyond, unless he pleads an improper plea.

1 Esp. 140,  
 219.

Essex 1789,  
 Manning v.  
 Story &c.  
 Clark & ux.,  
 his trustees.

§ 5. *An executor or administrator may be trustee by consent*, but see post. In this case, *Story* owing the plt. a debt, failed, and *Mary Wainwright* owed *Story* a debt. She died, having made *Elizabeth Wainwright* (now *Mrs. Clark*) her executrix, and left estate sufficient to pay all debts. The plt. sued *Story*, and he summoned *Clark's* wife as his trustee on the Massachu-

setts provincial trustee act, she being then sole. Pending this action Story sued her as executrix, and reduced the debt to a judgment. Then the plt. got judgment against Story, and against her as trustee by default. She married Clark, and now the plt. brings *scire facias* against Clark and wife. Judgment for the plt., that he have execution against her and her husband for the damages and costs on these grounds.

CH. 29.  
Art. 8.

First. Though said executrix owed Story on judgment, yet this debt was thus attachable, -he having no remedy against her, but a future action on his judgment against her for the debt she owed him. Quære, if he had been entitled to an execution on his judgment.

Second. She was trustee to Story, though she only as executrix owed him, that is, in *àuter droit*; it being well understood that the estate she represented was fully solvent. Quære, if she had left the question of insolvency open.

§ 6. In this case it was held, that a debt due to the estate of the plt's. intestate, or due to the plt. in *àuter droit*, might be attached on foreign attachment, and so taken to pay a debt that estate owed to a creditor of it.

3 Wils. 297,  
Fisher, adm.  
v. Lane & al.

§ 7. *A debt indirectly sold by an administrator.* In this case a debt of £105 was due to Thomas Reddin, the plt's. intestate, from Moses Hawkes, the deft's. intestate. Oct. 7, 1788, a former administrator on said Thomas Reddin's estate sold his debt to Shute by deed, who then was not administrator of, or any way concerned with, Moses Hawkes' estate, so then could not take a release of it. But afterwards Shute took administration on Hawkes' estate, and when sued as his administrator, as administrator of the debtor by the administrator *de bonis non* of the creditor, pleaded this deed as a release of the debt, and had judgment. And the court held, first, that though Shute was not capable of a release Oct. 7, 1788, when the deed was made, being a stranger to the debt and the debtor's estate, yet afterwards becoming his administrator he might plead the deed as a release by relation; though objected that a deed which was no release when made, and took effect, could not by subsequent matter or facts be turned into a release.

Mass. S. Jud.  
Court, Nov.  
1793, Essex,  
Reddin, adm.  
v. Shute,  
adm.

2d. That if there be proof a deed was signed and sealed, possession of it in the grantee is evidence of a delivery, unless it be proved he came *fraudulently* by it.

§ 8. In this case it was decided, that if A give a note to B and die, and A's administrator make payments on it to the promisee, before A's estate is rendered *insolvent*, not endorsed, and the whole note is allowed to B by the commissioners, and an order of distribution for the whole, and B brings an action on this order, A's administrator may prove these payments, and

Mass. S. Jud.  
Court, Suffolk, Wells v.  
Gray, admr.

CH. 29. thereby lessen the sum ordered by the probate decree, to be  
 Art. 8. paid to B. The conclusion from this case is, that the probate  
 decree is not conclusive as to the debt decreed ; for if it were,  
 this debt, so decreed, could not have been reduced by this ev-  
 idence. But this is the only case of the kind recollected.

Mass. S. Jud. § 9. The court held that if an annuity be given to A, to be  
 Court, Nov. paid by the *devisees* in the will, the action must be brought  
 1797, Pool v. against *them*, and not against the *executor* ; and the declara-  
 Pool. tion must state the devise and annuity, that the devisees ac-  
 cepted the estate devised to them, subject to the annuity, &c.  
 and that the executor is not liable.

Mass. act, § 10. *Contracts when there is a trust.* By this act, the  
 Mar. 10, 1784, treasurer of proprietors of lands in common and undivided,  
 --1 Salk. 79-- may sue for all debts due to them. If A take a bond in *trust*  
 3 T. R. 618. for B, it is not assets in his executor's hands. The plt. may  
 take a bond in trust for party's wife and sue it. And if a bond  
 be made to a Dean, Bishop, Parson, Vicar, &c. their *execu-*  
*tors* shall sue it.

1 Mass. R. 35, § 11. *Administration bond, the extent of it.* In this action  
 Henshaw, the court decided, that an executor or administrator is not  
 judge &c. v. bound by his bond to inventory the *real* estate ; for though by  
 Blood & al. the statute the administration is on the *goods and estate*, yet  
 204, Prescott, the condition of the bond is to return an inventory of the  
 judge, v. Tar- " *goods and chattels, rights and credits*" of the deceased. See  
 bell. also the chapter respecting *Insolvency*. This condition is not  
 consistent with our statute of March, 1784 ; for that express-  
 ly requires an inventory of the whole estate.

1 Mass. R. 1,4, *Nor is an administrator or executor entitled to costs for*  
 Gold v. Eddy, *travel and attendance*, before he actually comes into court to  
 admr. prosecute or defend the suit commenced by or against his tes-  
 tator or intestate. By the act of 1818, the real estate is in-  
 ventoried.

1 Mass. R. § 12. *Nor can executors or administrators refer before the*  
 200, Dana, *judge, but by statute.* In this case the court held that the  
 executrix, v. reference entered into before the judge of probate, by the ex-  
 Prescott, admr. cutrix, as to her demand *as executrix*, against the deceased's  
 estate, was void, and generally " that the judge of probate had  
 no authority to allow a reference of any demand which an ex-  
 ecutor or administrator, *as such*, has against the estate of the  
 testator or intestate." In this case, Anna Dana, the appel-  
 lant, was executrix of the will of Samuel Dana, and he was  
 executor to the will of Jno. Bulkeley, jr. and the demands re-  
 ferred, were the accounts of said Samuel, as such executor,  
 with said Bulkeley's estate.

1 Mass. R. § 13. In this case it was decided that if after an executor  
 502, Blossom is sued, he represents the estate *insolvent*, he is not entitled to  
 v. Goodwin, admr.



a continuance of course, but must go on to trial if the court think proper, &c. See *Insolvency*.

§ 14. Held that if an administrator *corruptly* neglect to oppose illegal claims against an *insolvent* estate, he is liable to an action by the injured party ; but that the probate court cannot reject the report of the commissioners on this ground.

§ 15. The court decided that if a *naturalized* citizen die *without heirs here*, and his administrator have in his hands money of his, he will be decreed to pay them into the state treasury.

§ 16. Held, if the creditors of an intestate recover judgment against his estate in the hands of his executor *de son tort*, he cannot extend his execution on the intestate's *lands*. He is not such an executor as the law intends, when it makes the lands of the deceased liable in the hands of his executor or administrator for the payment of debts.

§ 17. *No privity between an executor and an administrator de bonis non &c.* As where the executor of A's will recovered an *erroneous* judgment, it was decided that B, an administrator *de bonis non*, with A's will annexed, could not have a writ of error ; for there was no privity between this executor and B, such administrator ; and that this judgment &c. recovered by the executor, is no bar to an action to be brought by such administrator for the same cause ; for he is a stranger to the judgment ; nor can such administrator execute such judgment ; nor a succeeding administrator, a judgment recovered by a former one : and the judgment recovered by the executor on a bond, is no bar to an action of the administrator *de bonis non*, with the will annexed, on the same bond : and that the statute of 17 Ch. II, ch. 8, is not adopted in this state : but quære if not adopted here ; for certainly, judgments recovered by former administrators, have been enforced and sued by administrators *ne bonis non*, and this act is as useful here as in England ; and reasons as strong have existed for adopting it here, as for passing it there. The effect of this decision is done away, by a new statute of February 1813, and A. D. 1818.

§ 18. Held, an administrator may have trover against a *stranger*, for the conversion of a title-deed of the plt's. intestate committed in his lifetime ; though urged that the heir ought to have had the action, for here lands are assets in the hands of the executor or administrator, on a deficiency of personal estate. He defends on eviction &c.

§ 19. A. D. 1768, Jno. Storer died, and Joseph Storer administered and died ; plt. took administration *de bonis non*, on the estate of said John Storer ; defts. became administrators of said Joseph Storer's estate, and 1798 settled an admin-

CH. 29.  
Art. 8.

2 Mass. R. 80.  
Parsons v.  
Mills.

1 Mass. R.  
292, Dorr's  
case.

4 Mass. R.  
664, Mitchell  
v. Lunt.

4 Mass. R.  
611, Grout v.  
Chamberlain.  
—2 Selw.  
682.—7 T. R.  
152.—See ch.  
190, a. 3.  
Yare v.  
Gough.—Cro.  
Car. 167,  
Snake v. Nor-  
gate.—2  
Saund. 720.  
—1 Salk. 323,  
Clerk v.  
Withers.

Com. D.  
Admr. G.—  
Toller, 447,  
448, 449.—

6 Mass. R.  
394, 396,  
Fowle, admr.  
v. Lovitt.

6 Mass. R.  
390, Storer  
admr. v. Stor-  
er & al.  
adms.  
See post, a.  
16, s. 22.

CH. 29. istration account of their *intestate*, as he was administrator of  
 Art. 11. said John, deceased, allowed by the judge, and a balance of  
 ~~~~~ \$627,14 found due from said Joseph's estate, to the plt. as  
 administrator *de bonis non*. A decree passed that the debts.
 pay it to him.

2 Dall. R. 223.

ART. 9. *The power of a surviving executor to sell lands, &c.*

§ 1. In this case, land was devised to be sold, and the money to be divided, &c. but it was not said by whom the sale should be made; and the court decided that a sale made by the survivor of two executors, was good and valid, *a fortiori*, a sale made by both had been so; therefore executors are the proper persons to sell the testator's estate, ordered to be sold, when no persons in particular are named to make sale.

3 Mass. R.
 258, Dean v.
 Dean.

§ 2, Held, that an administrator can sell the estate of the *intestate*, only for the payment of debts he owed *at the time of his death*. But lands the administrator recovers on mortgage, or takes in execution, may, also, be sold for the payment of the *charges of administration*; and in granting a license to sell, the court may direct what part of the real estate shall be sold first, as lands not devised, the residuum, &c. Executors administer, *ex officio*; estate not devised, this is the statute and usage.

6 Mass. R.
 Hays & al.
 exrs. v. Jack-
 son, 149.

ART. 10. *Lands sold by executors, to pay debts, the effects.*

2 Dall. Rep.
 292.

§ 1. In this action it was resolved that if a testator empower his executors to sell lands for the payment of *debts*, the purchaser holds them discharged against *creditors*, otherwise if the powers be to sell to pay *legacies*. This is the law in Pennsylvania, and is the law in Massachusetts, with, perhaps, the exception, if the land be sold to pay legacies by the testator's will, and then the lands be wanted to pay *debts*, the proceeds, wherever to be found, would be applied to pay *debts*, instead of the land; but if the creditor levy on the lands so sold, the levy must be good; for the creditor has his right by law, and it cannot be taken away by the testator's will in favour of *legatees*.

5 Mass. R.
 41, the peti-
 tion of Gay,
 admr.

§ 2. Held, that an administrator has power to sell a *leasehold estate for ninety-nine years*, as *personal estate*, without obtaining a license from the court, as in case of selling real estate for the payment of debts. Indeed the executor or administrator has of course, a disposing power over all the estate of the deceased whatever, except his freehold estates. Cannot sell real estate twelve years after licensed by court to sell. Mistake of day of sale in the notice is fatal.

15 Mass. R.
 326.

ART. 11. *Administrators how accountable for effects abroad.*

§ 1. It is a general principle that an administrator is not

accountable (if duly diligent) for *choses in action* till recovered; nor for goods or effects abroad, and beyond the reach of the laws of the country, till he can get them into his possession. The foreign government where they may be, is not obliged to grant him administration, nor can he sue and recover them in that country, till he *there* has administration.

CH. 29.

Art. 13.

§ 2. In this case the court decided that one domiciled in England and dying *there*, and his administrator with the will annexed coming into this state, and filing a copy of the will in the probate office according to our acts of June 29, 1785, and here taking administration with the will annexed, is not held to account *here* for the effects he received in England.

2 Mass. R.
384, Select-
men of Bos-
ton v. Boyl-
ston.

§ 3. The testator directed that if certain bequests to his wife should not be sufficient for her support, his executor should sell certain lands for that end. The executor died, and after his death a stranger supplied her. Held, he had no action against the testator's estate.

2 Mass. R.
168, Hunt &
al. exors. v.
Holden.

ART. 12. *Where an executor may be sued &c. in his own name.* 10 Mod. 254.

§ 1. An executor may be sued in his own name, on his *own promise*, to pay the testator's debt at a future time; so for *rent or repairs on his own possession*, and if named *executor*, it is but *surplusage*. But if he be charged as *executor*, though for non-repairs in his own time, judgment shall be of the testator's goods; for the *plt.* charges him in *auter droit*, and he does not object; then the court, in such case, will give judgment according to the record.

§ 2. Where A is indebted to a *feme covert executrix*, and promises payment to her husband, the consideration being forbearance, he alone must bring the action; and if the husband die, his executor shall have execution, and it is no part of the testator's personal estate; yet when recovered it is a *devastavit* in the husband so far as he recovers.

12 Mod. 207,
Yard v. El-
lard.

§ 3. Where a will is not found, and administration is granted to A, and he appoints B, who collects the deceased's debts and pays over to A, the will is found, but the executor cannot sue B for money had and received.

2 Ld. Raym.
1210, Pond
v. Under-
wood.

ART. 13. *Administration void or voidable.* § 1. When the question before the judge is, if he have jurisdiction of the subject matter or not, he decides at his peril. If he err and assumes a jurisdiction he has not, his act is void. Therefore, if a judge of probate grant administration more than twenty years after the death of the intestate, the act or grant is void, and not merely voidable; and this, whether he died before the act of March 9, 1784, was passed, or since; for the probate judge has no power to grant administration but in virtue of that act; and this expressly forbids any administration to be

2 Mass. R.
120, Wales,
admr. v. Wil-
lard, exr.

CH. 29. granted after the expiration of twenty years after the intestate's death. But when the question before the judge is only
 Art. 13. as to the manner of exercising his jurisdiction, there his mistake is corrected by appeal, and his act is not void, but only voidable, and so valid till avoided, by appeal, where one has an opportunity to appeal, and where not, by pleading, as error lies not in probate cases, 11 Mass. R. 507.

5 Mass. R.
 275, Jewett v.
 Jewett, adm.

§ 2. If an action be brought against an administrator, it is a good plea in bar, that since the action was commenced against him, he has been removed from office by the judge of probate; for now the plt. has no cause of action against the deft. in this or any other form. Held, the probate judge's power to grant administration on the estate of an inhabitant of the state, is confined to the county where he lived at his death exclusively, and the doings of any other judge on such estate are void.

9 Mass. R.
 543, Cutts &
 al. v. Haskins.

Toller's L. of
 Executors
 118, 122.

§ 3. *Administration void or voidable.* It is void generally if there be an executor, though unknown, who still has a right to act. So if granted by a judge who has no power to grant it, as of a wrong county, though doubtful who is executor, or he is abroad, or if granted before his refusal, though he afterwards refused, Com. D. Admr., B. 2, B. 10, so because he is a bankrupt; in these and other cases named, the administration is a mere nullity. So a nullity in S. Carolina, where granted by the ordinary during the executor's absence out of the state, he being qualified and capable, and having accepted the trust. 2. A judgment recovered against the intestate and revived against such administrator is a nullity, and a *scire facias* issued thereon, and sale of lands of the intestate at auction are also null and void, and his heirs can recover in *clausum fregit* against a *bonâ fide* purchaser under him, who purchased of the sheriff at such sale; sundry cases cited and points decided, 8 Cranch 9 to 30, Griffith v. Frazier.

But it is only *voidable*, if only granted to a wrong person, or to two, and one is not entitled to it, as to a sister and her husband, Com. D. Admr. B. 8, or to the wife's next of kin, instead of the husband's, id.; or on the refusal of an executor who had before administered, id.; or without citing the necessary parties id.; or to a stranger, or by fraud, or to a creditor before the next of kin refuses, Com. D. Admr. B. 6. It is stated in the English books, that administration is granted to the next of kin on account of his interest, and therefore if that cease, the reason ceases, and it is to be granted to the residuary legatee if there be one, whether there be any present residue or not, Com. D. Adm. B. 8; and if the wife be one and executrix, and die, it must be granted to her husband *de bonis non*.

Wherever the administration is void, as above, the mesne acts of the administrator are void also, Com. D. Adm. B. 10, for all in such case is void *ab initio*; but if only voidable, as above, there is another distinction if on an appeal his mesne acts are void, as this suspends the former sentence, and on its reversal it is as if it never existed, 3 D. & E. 129; but if only voidable and on citation, all the mesne acts are valid. But void or voidable, a *bonâ fide* payment to the administrator of a debt due to the estate, is a legal discharge of the debtor, in analogy to a payment under a probate of a forged will, 3 D. & E. 125. But if revoked on appeal, as the administrator's power is suspended by the appeal, and in fact never is granted to effect, hence such payments are void.

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Toller's L. of
Executors,
128, 132.

ART. 14. *Administrator's contracts to convey intestate estates.* The defts., administrators of the estate of Obadiah Williams, bound themselves to convey a part of his estate to the plt. in fee in one year. It is no legal defence for them to plead his estate is insolvent, and they sold it by license of court to pay his debts, to the highest bidder, the plt. being present and requesting them to do it; nor, that since they so bound themselves the whole of the land has been covered by a town way; for this "is not a performance of the condition, nor is it any legal excuse for not performing it." The defts. ought to have procured some person to become the highest bidder, who would have conveyed to them or to the plt. And as to the road, they ought to have conveyed the land subject to it, for the soil remained in the former owner; and an easement as a right of way only would pass.

4 Mass. R.
427, Fairfield
v. Williams.

One sells land as executor, and so names himself in the deed. A power from a court to him as administrator, to sell, will support the sale, Cook & ux. v. Griffin.

Mass. Sup. J.
Court, Essex,
April 1803.

ART. 15. *Executors and administrators may retain and take bonds of indemnity &c.* § 1. Retainer is a remedy by act of law, and is where a creditor is made executor or administrator of the debtor. As he cannot for the debt due to him in his own private capacity sue himself as executor or administrator of the debtor, without a manifest absurdity; the law allows him to be in the same situation he would have been if he had sued. May distrain for rent in arrear to the deceased, 3 Salk. 136; and may have error to reverse the testator's attainer, 1 Salk. 295.

Hob. 10.—
3 Bl. Com.
11.—5 Co.
31, 32, Coul-
ter's case.
See debt for
rent.—1 Ld.
Raym. 172,
Howell v.
Bell; King v.
Ayloff.

§ 2. Executors and administrators suing out mortgages &c. See Mortgages.

§ 3. *Lands devised to executors to sell.* "Where one devises lands to executors to be sold, or his lands to be sold by his executors, which is all one, if they sell not in convenient time the heir may enter." "But when one devises, that his

Salk. 318,
Baron and
Feme, see Ch.
135.

CH. 29. executors shall sell his lands, they may do it at any time, for
 Art. 15. in this case they shall not take the profits;" they have but a
 chattel interest.

Moss & al. v.
 Moss's adm.
 4 Hen. &
 Mun. 293,
 314.—Vir-
 ginia Act on
 the subject,
 1 Rev. Code,
 Ch. 66, p. 79,
 substituted
 such further
 process to
 bring in defts.
 to the former
 mode of out-
 lawry. See
 Ch. 80, id.

§ 4. This was debt on a joint and several bond, given by six distributees of an intestate estate to indemnify the administrator for dividing the estate among them; conditioned "that they should pay him their respective proportions of all debts he should be compelled to pay, that should thereafter come against the said estate." The action was against all the obligors; the *capias* was returned executed on only two of them, who appeared and defended the suit, and there was a discontinuance as to the rest by failure to take out further process against them; a judgment against the defts. in general terms was understood as against those only who appeared, though the declaration charged them all as in custody &c., and the caption of the entry of the judgment in the order book mentioned the name of all. Held, second, the plt. was not bound to sue out further process against the rest, but might take judgment against the two: 3. Indifferent whether the declaration was against the two only, or against all named in the writ, provided the bond was well described: 4. It was a sufficient assignment of a breach to say, "that the plt. on a day after the date of the bond, had paid by the consent of the defts., a debt that was then due from the estate aforesaid, and which as administrator he was bound to pay; and that the defts. had not paid him their respective parts or any proportion thereof, but the same had refused, although often requested." The officer's return as to three of the defts. was, that they were not inhabitants of his county to which the writ was directed, and a copy left for the fourth. There was no plea in abatement, that the proceedings were against two of six joint and several obligors, all alive. But the two, after various pleadings waived, joined in an issue of inquiry &c. The above decisions were by two judges against one. The case seems to have rested mainly on such English common law authorities as are in use in the United States generally; hence were cited, 9 Co. 119, by counsel; cited by judge Tucker against the decisions above, as to a discontinuance, 3 Bl. Com. 282, 296; 1 Wash. 372; a verdict aids it only after the deft. has appeared, (the forthcoming bond given by the two was not before the court, the *supersedeas* being only to the original judgment; *Leftwich v. Stoval*, 1 Wash. 303; *Sayre v. Grymes*, and *Holcombe v. Punal & al.*, 1 Hen. & M. 406, 407,) the material point, the declaration, he observed, was on a joint bond of six obligors, made so by the pls., all named in the writ, served on two of them only; *alias capias* awarded against the rest. Though the plt. could not proceed against

the two only before the rest were taken, or the process substituted for outlawry had been issued and duly returned, cited 5 Co. 119; 1 W. Bl. 20; 6 D. & E. 328; 1 Wils. 78, *Symonds v. Parmenter*; 1 Stra. 473, *Edwards v. Carter*; *Leftwich v. Berkely*, 1 Hen. & M. 66; 1 Call. 275; 1 Saund. 291, b note (4,) and many cases by him cited, was answered, the Virginia practice had been otherwise fifty years. Judge Tucker held the judgment void as to the four, and being entire was void as to all, cited *Ld. Raym.* 600, 602; *Cro. Jam.* 303, *King v. Marlborough*; *id.* 304, *Miles v. Pratt & al.* The other judges held, as above, that the judgment was only against the two who pleaded &c., and that the caption was the mere error of the clerk, cited the Virginia act of *jeofails*, 1 Rev. Code, p. 111, by which one part of the record may be amended by another, and *Stephens v. White*, 2 Wash. 212; 8 Co. 158; 1 Bac. 164. Such a case often exists in principle in every State; see Ch. 194, a. 6, s. 22; Ch. 175, a. 8, s. 13 to 17; Ch. 176, a. 3, s. 11, &c.

ART. 16. Pleadings and evidence &c. by executors and administrators. As all torts, and of course actions thereon die with the testator or intestate, his executor or administrator does not represent him in this respect, except on the 4 Ed. III. But he fully represents him in all his contracts that do not terminate with his life, whether the executor or administrator is named in them or not. He may demand all his personal estate and debts due to him, and is subject to fulfil all his contracts, so far as the executor or administrator has assets; and if he be not in fault, he is never "bound to pay more for his testator than his goods amount to." Executors may release or take releases before probate, if they prove the will afterwards, so by the English law they may sue before probate.

Before probate and before any seizure the law adjudges the property of the testator's goods in his executors; hence, if then taken by A, they may have trespass or replevin, the same as to an administrator, for an administration when granted relates back to the death of the intestate. Debt does not lie against an administrator on the intestate's simple contracts, *New. R.* 293, *Barry v. Robinson*.

Each executor has the entire controul of the personal estate of the testator, may release or pay debts, or may transfer any part of his personal property without the concurrence of his other executors; so of administrators; so one executor may sell a leasehold estate, and the executorship and administration survive. Hence, an executor or administrator may sue or be sued accordingly, nor can a probate under which the executor acts be impeached in the temporal courts till it is repealed.

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2 Atk. 571.—
1 Vez. 396.

General principle.
Toller's L. of
Ex. 131, 458.
See Ch. 7. s.
12.—Willes
413, 422, *Sollers v. Lawrence*.

Went. Office
of Ex., Ch.
12.—1 Inst.
292.

Plowd. 281.

2 Rol. Abr.
399.

2 Selw. N. P.
680, 682.—
2 Vez. 268.—
Rastal 560.—
3 T. R. 125,
Allen v. Dundass.

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All debts due and inventoried are deemed *assets*; but the executor may discharge himself of them by shewing they are bad, or by shewing a demand and refusal of them. 2 Selw. 695; Salk. 296.

And according to late decisions in this state, executors and administrators have no concern with the real estate to recover or defend the freehold. Hence it is but very seldom they have occasion to plead in regard to the real estate in *auter droit*; perhaps never, but where they sue or are sued on the covenants or contracts of the testator or intestate relating to it. Hence all pleadings by them are limited to such covenants or contracts.

3 T. R. 690,
Rock v.
Leighton.—
2 Selw. 695,
696.

In England, if an executor suffer judgment against him by default, or it is found against him on plea of payment or of *non est factum*, it is an admission of assets, and if on execution *nulla bona* be returned, he is guilty of a *devastavit*. 1 Wils. 258, Skelton v. Hawling; 1 Saund. 219, same case; 3 T. R. 685, 686, Erving v. Peters.

5 T. R. 8,
Cleverly v.
Brett.

If an executor pay interest on a bond due from his testator, yet he may plead no *assets* to pay the principal, and prove the fact.

1 T. R. 691,
Barry v.
Rush.—7 T.
R. 463.

But if the deft. bind himself as administrator to abide a certain award, touching a matter between his intestate and another, and the arbitrator award the deft. as administrator to pay £10, he cannot plead want of *assets* in this case; for by giving the bond he undertakes to pay what shall be awarded, but does he not by our law engage to pay *subject to insolvency*. See Ch. 29, a. 8.

5 T. R. 6,
Pearson v.
Henry.

But a mere submission to arbitration is not of itself an admission of *assets*; for where the arbitrator only ascertained the amount of the demand, and without ordering the administrator to pay it, it was holden the administrator might plead *plene administravit*. Plea in Virginia, s. 31.

These principles as to *assets*, hold in Massachusetts where the estate is not insolvent and so rendered. But if an executor or administrator render the estate insolvent, according to the statutes on the subject, it is conceived that such a judgment recovered against him is *subject to the insolvency*. Often such a judgment may be recovered against him before it is suspected the estate will be insolvent. Administrator may be sued on a plain note of hand where he has no defence, and no matters whereon to represent the estate insolvent, the court will default him. Soon after debts appear, that make the estate insolvent, it would be unjust to make him pay the whole of the judgment on the note; so if he submit to an award, it must be understood that the sum awarded to be paid shall be subject to a legal insolvency.

By the 4th of Ed. III, c. 7, adopted here, an executor, and by construction an administrator, may have trespass or trover for the goods of the deceased taken away tortiously in his life time, to recover the value of them, but not *quare clausum fregit*; and so is our practice. So may have replevin. So, if a bail bond be assigned to A, his executor may sue it. Cro. El. 384, *Smith v. Colgay*; 2 Selw. 698; Bro. Ex. 129.

Pleadings by executors and administrators as such, are nearly confined to cases of contracts, and as they generally plead such pleas in substance, as their testators or intestates would, there will be found but a few pleas peculiar to executors and administrators. The description of themselves and declarations as p'ts., as well as pleas as defts., are simple and uniform in all the books. There are, however, some pleadings peculiar to them at common law, as well as by some statutes.

§ 1. It is a rule, that the executor or administrator cannot join in an action with the surviving promisee, not only because the promise survives to him as it respects the remedy, but no two or more can join who sue in different rights.

§ 2. When executors and administrators must or may sue as such, or in their own right; see Ch. 9. a. 19, *Auter Droit*. So as to joining matters.

§ 3. It is a settled rule, that all the executors and administrators must join in bringing the action, or be joined if sued. As where debt was brought against two executors, who pleaded in abatement, that one H. was made executor with them, who had administered &c., not named in the writ. Replication that H. refused &c. and that the defts. alone proved the will. Defts. demurred; judgment for them. For though H. had refused, yet he might afterwards administer at his pleasure; for when some of the executors prove the will and some refuse, and the will is however proved, the latter may come in; but if all refuse, administration may be granted, and they cannot come in. The reason is, when one proves the will, it is proved, and the party dies testate, and the executor who proves ought to name those who refuse, in every action he brings, and they have actions by survivor. But if all refuse, the party is dead intestate, and they can never administer as executors. This is the law in England, and in the States in which the English law is in this respect adopted. But the law in Massachusetts is not so, by that an executor cannot be said to have administered till he gives bond, and after he has refused, he cannot come in; hence he may not be named in the writ.

And in this case even in England, A. D. 1790, one executor named in the will was not joined, yet held good, because he did not prove the will and did not administer. But this was not pleaded in abatement, but in bar; and the executor who

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Toller 432 —
2 Ventr. 249.
Com. D.
Adm. B. 13,
Covenant B.
1.—3 Bac.
Abr. 91.

1 Mass. R.
104, 108,
Walker v.
Maxwell.

9 Co. 36 to
42, Henloe's
case. Like
case 3 Salk.
163, 164.—
2 Saund. 213.
—3 Inst. Cl.
53.—1 Com.
D. 18, 30, 31.
—5 Com. D.
Pl. 2, D. 1.

3 T. R. 557,
Rawlinson
v. Shaw, exr.

CH. 29. refused was a creditor. And in this case Grose J. said, "it is laid down universally in all the authorities on the subject from the year books down to the present time, that a deft. who is sued as executor cannot plead that another person is also executor with him, unless he avers that that other has administered." "And the case of *Swallow v. Emberson* is directly in point;" and the reason is the same whether plt. or deft.

Cites 1 Lev. 161.

2 Selw. 701,
Foxwest v.
Tremain.

2 Saund. 212.

2 Selw. 665.

And all of the executors must join in the action, though some of them be infants, and those of age may appoint attorneys for those under age. And if one be of age and the other not, the former is appointed administrator, *durante minore etate* of the latter. At common law, an infant executor was of age at 17, but by 38 Geo. iii. ch. 87, s. 6, not till 21, if sole executor.

Feb. 6, 1784,
13 Masa. R.
201.—2 Selw.
706, *Swallow*
v. *Emberson*.
—1 Lev. 161.

As to the rule *actio personalis moritur cum persona*, &c. see ch. 7, and as to executors and administrators promising to pay the debts of their testators and intestates, see chapters 9. and 11. By our statute, if several be appointed executors none can intermeddle as such, but those who actually give bonds.

§ 4. Rule: the plt. need sue only such executors as do administer. Therefore, if the defts. sued as executors plead in abatement that there is another executor not named in the action, they must add that he *has administered*; "for the plt. is bound to take notice of such executors only, as have administered." Though executors cannot sever in declaring, they may in pleading: hence, though infant executors may sue by attorney with executors of age, because those of full age may appoint attorneys to those within age; yet they must defend by guardian.

Stra. 793,
Frescobaldi
v. Kinaston.

2 Selw. 708.

If any of the executors die, the action must be brought against the survivors; and if there be two or more administrators they must all be sued. The form of the plea is that one not named administered. But if an administrator be not sued, the one sued need only plead the other was appointed and is alive. He cannot be appointed, unless he accepts and gives bonds, and then he is completely administrator. If one summoned and severed die, the writ does not abate.

Story's Pl. 2.
3 Inst. Cl. 53.
Toller 446.

2 Saund. 291,
notes of Wil-
lams.—

Cro. Car. 420.

§ 5. Rule: if there be two or more executors, and one not sued, it can only be pleaded in abatement.

§ 6. Rule: if there be two executors, and one refuses to sue, the one may sue in the name of both, and have summons and severance. Principle of Ch. 1, a. 6.

Story's Pl. 4.
Francis v.
Winn.

§ 7. If one be sued as executor and pleads never executor, he must add, and that he never administered as such, upon any of the goods and estate, &c.; and the plt. need only reply that he did administer upon the goods and estate, &c.; for

the deft. is liable to be sued as executor, if he be only executor of his own wrong, by administering only. Plea, never executor, ought regularly to be in bar. And if two be sued as executors, one of them may plead, the other was dead when the writ was sued out; for the writ was bad, and void *ab initio*, and this is matter in abatement. If an executor, &c. be sued in several actions, he may plead *plene administravit*, specially; see the manner, Doug. 452.

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Story's Pl. 41.
Waters v. Ogden.

§ 8, The plea of *plene administravit*, in England, and where this plea applies, is important, concerns many cases, and is attended with many nice distinctions and difficulties; several of which are stated, 2 Selwyn 709, 716. The general rule is, that an executor may plead in bar the same plea his testator might have pleaded, as in assumpsit, "*that his testator never promised*," or in covenant, or debt on bond, "that it is not the deed of the testator." So he may plead "that he has fully administered all the goods and chattels which were of the deceased at the time of his death." So he may plead an outstanding debt, as a judgment, &c. And the same rule holds in regard to administrators.

See Insolventy.

But in Massachusetts, this plea does not often apply; nor is it recollected that it has ever been pleaded here; because here the executor or administrator, if he has no other plea in bar, must pay all the debts of the deceased, or render his estate *insolvent*; and if *insolvent*, all debts of whatever nature, with the special exception in the statute, must share alike, including debts due to the executor or administrator himself.

A gets judgment against a sheriff for an escape; debt on it lies by A against his executor. So debt on a judgment lies against him on Massachusetts statute of Feb. 26, 1796.

Toller, 459.
—Dyer 322.

§ 9. Nor does the doctrine of *retainer* apply here, for the same reason; the executor or administrator must pay all debts, then he has no occasion to answer another creditor by the plea of *retainer*; and if there be not estate enough to pay all, he must render it insolvent, and except as above, pay all in proportion. And if his own demand against the estate of the deceased be disputed by the heirs or others concerned, it may be referred according to the act of the State. In England he may plead a *retainer*, or give it in evidence.

1 Esp. 288.

§ 10. As to the statute, the executor or administrator may plead the deceased never promised *within six years* before the commencement of the action; or the more proper plea is *actio non accrevit infra sex annos*. And there seems to be but one distinction peculiar to executors and administrators, in this respect, and that is, if the action accrued to the deceased in *his life time*, it must be commenced within six years from the time it accrued, though part of the time there may have been

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2 Selw., title
Executor.—
13 Mass. R.
203.

no administrator. But if A. receives the deceased's monies after his death, and so was never liable to him, the six years commence from the time administration is taken on the estate of the deceased. And he may recognize a debt so as to take it out of the statute of limitations; but his promise to pay the intestate's debt will not take it out of the statute of 1791, c. 28. Plea, four years had elapsed &c., replication, the deceased's estate is solvent &c., and the plts. within four years, &c. exhibited to the deft. said notes &c., (notes sued) and demanded payment &c., and the deft. promised to pay them &c. in her said capacity; to this replication deft. demurred generally. Held, as above, 13 Mass. R. 201, 203, *Brown & al. v. Anderson, admr.*, and 15 Mass. R. 6.

§ 11. As to pleadings by executors and administrators in relation to probate bonds, see Debt on Probate Bonds, Ch. 149.

§ 12. If an executor or administrator be sued as trustee for a debt or legacy, he owes *as such* to the deft., he must answer pertinent interrogatories, so that the court may have the facts specially; for he may be trustee or not, according to circumstances. See article Trustee, and article 8, ante.

§ 13. As to the distinction in England, and some of the United States, between declaring in the *debet and detinet*, or in the *detinet*, it is not applicable in Massachusetts; for the practice here is to declare on the contract according to its legal operation, without saying technically he owes, and unjustly detains, or he unjustly detains; yet when he is chargeable *de bonis propriis*, he is held in the first manner, and when in *auter droit*, in the second. In Virginia the English principle is adopted. Hence, if A's executor gets judgment for a debt due to A's estate, against B, administrator, and the executor sues on it said administrator, to charge him *de bonis propriis*, he must allege waste, and declare in the *debet and detinet*, 3 Hen. & M. 123, *Spotswood v. Price*.

§ 14. As it is not recollected that heirs in this state have ever been sued on the covenants or contracts of their ancestors, and it is doubtful at least, if they be liable, as our law gives the executor or administrator power over the *whole estate* of the deceased, for the payment of his debts, and the fulfilment of his contracts, it seems to be a fair inference that the executor or administrator (and not the heirs) is liable, in every case, on such covenants and contracts, where any action lies, except as in a. 4, s. 13.

1 Esp. 296.

§ 15. On the plea, never executor, it is not a question merely whether the person is actually executor, "but whether administration has been properly committed to him or not." And on this plea, he may give in evidence, that the seal of the ordinary was forged, or that administration is repealed,

but not that another is executor, or that the testator was *non compos*, or that the will was forged. If one be administrator and not executor, this he must plead in abatement; for a recovery against him *as executor* may be pleaded in bar in an action against him *as administrator*, for the same cause. An executor *de son tort* shall never be intended; but if one plead he is not administrator, but executor of J. S., he must add *absque hoc*, that J. S. died intestate.

§ 16. If execution issue against one for his own debt, who is executor, the goods of the testator cannot be taken on such an execution, though such executor may sell the testator's goods; but if he consent to their being taken on such an execution, it amounts to a sale. So in this case it was said, if an executor grant all his goods, not only his own, but what he has as executor pass. So of a release of all actions. When the executor has paid debts of the testator, his goods may become the executor's as a purchaser; or the court will intend the property of the testator's goods altered, after a long possession by the executor. An executor or administrator cannot devise the goods of the deceased; but he has the property of them vested in him, before actual possession, and may have trover accordingly; but if he use or treat them as his own, they will be liable for his own debts. Baron and feme *executrix* get judgment and she dies; it goes to the administrator *de bonis non* of her testator: the husband has no right.

§ 17. Pleas in relation to *devastavit* or *waste*. The plt. recovered judgment against Lane, as executor of A, and then brought his action against him in his *natural capacity*, alleging the recovery, and that *the deft. wasted the goods of the testator*, to the value of the debt recovered, by which the action accrued to the plt. &c.; and on argument held good, and judgment for the plt. Where the plt. cannot reply *de son tort*, *deft.* being administrator &c.

In this case it was held to be waste in an executor, to let interest run on, if he have assets to pay. And where the wife is liable for waste while sole, her husband becomes liable.

So where A got judgment against J. S. as executor, and died, and A's executor brought debt on the judgment against the said J. S., held that A's executor *may suggest waste* in A's lifetime. So it lies for the executor, to whom the tort is done; but not against the executor of him who did the wrong. In this last case the rule *actio personalis* &c. applies. Husband, and wife, *executrix*, commit waste—he is not liable after her death, except there is a judgment against them.

To the suggestion of waste in a declaration against an executor or administrator, the proper answer or plea is, that he has not wasted the testator's goods &c.

CH. 29.
Art. 16.

1 Esp. 298.

Salk. 297.

1 Esp. 299.

4 T. R. 621,
Farr. & al. v.
Newman &
al. Cites 2
Rol. Abr. pl.
8.—1 Leon
263.—Shep.
Touch. 94.—
See Sugden
384, *exr's*.
power to sell.
—14 Ves. jr.
353.—1 Com.
D. 329.—17
Ves. jr. 132,
167, 97.—
1 B. & P. 293,
Quick v.
Staines.—
2 Dickens,
725.

1 Saund. 46,
Wheatly v.
Lane.

8 Johns. R.
126.

3 Salk.
125, 126.—
Cro. Car. 603.
—Salk. 314,
Berwick v.
Andrews.

3 T. R. 685.—
Cro. Car. 519.
—3 Salk. 125,
160.

CH. 29. It is waste to pay an usurious bond, or a legacy, *after* a
 Art. 16. contingent covenant is broken, but not before; Hob. 167; 12
 Mod. 11, 411, 523.

Toller's L. of
 Ex. 424.

As a general rule, any tortious or negligent act in the executor, or administrator, whereby the goods of the deceased are rendered less sufficient to pay debts, is waste. So extravagant expenses at the funeral may be waste. So by assenting to a legacy where not assets sufficient to pay creditors; Off. Ex. 158. So if the executor in any way release, or give up a debt, or right of action, to the testator, the executor is chargeable to the amount given up, paid or not; Off. Ex. 159; Hob. 66; Cro. El. 43. So if he take an obligation to himself in lieu of a simple contract to the testator; 2 Lev. 189; 3 Bac. Abr. 78. So if he only apply to the debtor for a debt, but neglects to sue him, and thereby it is lost; 3 Bac. Abr. 60. So if he negligently lose the debt by the debtor's plea of the statute of limitations; 12 Mod. 573. So if the executor's agent embezzle the assets; 6 Mod. 93. So if he annex a *lease for years* to the *inheritance*, whereby it ceases to be *assets at law*, 1 D. & E. 763. So if he sell the testator's goods at an under value, though the appraised value, Off. Ex. 158; or neglect to sell them at their full price, and afterwards they are taken from him; or delays to dispose of them, by which they are injured, he must personally make compensation; 6 Mod. 181, 182; but not if they be taken from him without any imputation on him, though he recover not their value, but is only liable for what he recovers; 1 Bro. Ch. R. 361; but if perishable and impaired, not liable, if no delay or negligence on his part, beyond what they sell for; but if taken, he must sue the taker, to exempt himself from any greater claim than the damages recovered; 6 Mod. 181; but quære if this taker be worth nothing. But is not answerable if he lend money on security, good at the time, if it fail, or vest it in the funds and they fall; 2 Bro. Ch. R. 231. He has an honest discretion to call in debts, out on interest; nor is a conversion of the assets to his own use waste, if he pay debts of the testator to the value, with his own money; 1 Saund. 357; Com. D. Admr. J. 2. Nor is it a *devastavit*, for the executor to compound an action of trover for the testator's goods, and to take a bond for the money, payable at a future day, as this money is assets immediately; 2 Lev. 189; but is chargeable if never paid. If rent be due on a lease, and the tenant become *insolvent*, and the executor release the rent, and give him a sum of money to quit possession, and in all this evidently acts for the benefit of the estate, he shall be allowed both; 3 P. W. 381. The principle of this last case will be found to apply to a very great number of

cases, in which the executor acts honestly and prudently, though there be a loss to, or diminution of, the testator's estate or rights. A *devastavit* may be proved under a commission of bankruptcy. If a *feme executrix* marry A, and he commits waste, both are liable: *aliter* if she become executrix after married, and he alone is liable; 2 Bro. Ch. R. 323. A *devastavit* by one executor, does not charge his companion; Dyer 210; 3 Bac. Abr. 31; and if several executors or administrators, each is liable only for what he receives, provided he no way contribute to the *devastavit* of the other. On a *devastavit* the executor or administrator answers to the amount of the goods wasted, out of his own estate; Com. D. Admr. L. 3; 3 Bac. Abr. 77.

CH. 29.
Art. 16.

§ 18. Assumpsit against an administrator on the intestate's promise; an account stated with the administrator as such, does not make him personally liable where the account is of money due from the intestate, *Suar v. Atkinson*. But if an executor state an account of monies due from him as such, he is personally liable, *Rose v. Bowler*; and if a declaration be demurred to for misjoinder of counts, the plt. cannot enter a *nolle prosequi* as to some, and leave the others remaining.

5 Com. D.
561, Pleader,
2 D. 1.—1 H.
Bl. 102.—
1 H. Bl.
108, *Rose v.*
Bowler.

§ 19. If an executor do not plead a judgment recovered against the testator, to the action, he shall not afterwards plead it, to the *scire facias*; and an executor *de son tort* shall not plead payment of debts, though he may give it in evidence on *plene administravit*. And as this executor *de son tort* cannot represent the estate insolvent, being unknown in the probate office, and yet is not liable further than he receives assets, if he plead properly, it may be a question if much of the English doctrine of *plene administravit* does not apply to him here.

Stra. 782,
East v. Hin-
ton.—1 Salk.
315—5 Com.
D. 563—
3 T. R. 687.
—5 Com. D.
761, Pleader,
3 L. 12.

§ 20. The executor or administrator has several other pleas in bar. He may plead *nul tiel record*; so payment; so if judgment against A and B, and *scire facias* against the administrator of A as survivor, the deft. may shew B survived. So a release to the testator, intestate, or himself; or a release by one administrator or executor to one executor or administrator. So outlawry, after the judgment has ascertained the damages in assault and battery, to a *scire facias* thereon. So that the plt. levied debt and damages by *scire facias* against the testator, so that he took the debtor in execution, and permitted him to go at large; but not that he died in prison.

5 Com. D.
Pleader,
3 L. 12.—
1 Salk. 262.
—3 Lev. 272.

§ 21. As to petitions and pleadings by executors and administrators in relation to selling or conveying lands by license of court, in what order, on what seisin, &c. see chapters respecting such conveyances. Two executors are sued, one is defaulted, one appears, judgment is against both *de bonis testatoris*.

Cro. Car. 328.
—5 Com. D.
762.

1 Salk. 312.—
2 Ld. Raym.
870.

CH. 29.

Art. 16.

6 Mass. R.
390, Storer,
adm. v.
Storer & al.
admsrs., see
art. 8.

§ 22. A dies intestate, and B administers on his estate, and dies. C takes administration on A's estate *de bonis non*, and D takes administration on B's estate. C and D settle an account, and there is found due \$500 from B's estate to C, as such administrator of A. The judge of probate decrees D as administrator of B, to pay this sum to C, as such administrator. Held, C as such administrator may have debt on this decree against D as administrator, though objected that D ought to be sued in his own right; for though the parties settle the account, it and the decree are still between them as administrators, and if D have not assets of B's estate to pay the \$500, he may plead no assets. And if judgment be against an administrator by *cognovit actionem*, this does not confess assets, and debt on this judgment must be against him as administrator, that he may plead no assets; or if he have assets and pay it, he may charge it in his administration account. A judgment on the administration bond of B in this case is a mere cumulative remedy, and such judgment not satisfied is no bar to such action of debt or other remedy. Satisfaction in either case defeats the other remedy, and may be pleaded accordingly. D in this case should not have charged himself with said \$500 till he had recovered it. In this case the \$500 was a debt in substance due from B, and D, his administrator, only adjusts it; hence, it is consistent with the rule, that the administrator cannot by his promise bind the estate of the intestate so as to subject it to a judgment and execution; and however *dictums* may be in the books, it is a clear principle of law here, that whenever an administrator must adjust by an *insimul computasset* an account or demand against his intestate's estate, the adjusted sum is still a debt due from it, subject to its insolvency, and the administrator is to be sued as such; but then the declaration or plea in the case must state the monies &c. were due from the intestate's estate. It never can be intended, that the administrator of an estate to which a balance on an adjustment is found due, means to claim it in his own right, or the administrator of an estate against which a balance is so found means to make himself personally liable for it, though the estate be insolvent.

11 Mass. R.
233, Clark &
al., admsrs. v.
May.

The plt's. administrators neglected to get a stay of execution against their intestate's estate, and his chattels were sold on it, the estate being insolvent. Held, they had no action against the officer who sold them. The plt's. should have prevented the issuing of the execution.

7 Mass. R.
510, Barber
& ux., admsrs.
v. Bush.

§ 23. *Feme administratrix marries; she and her husband must sue.* As in this case on a note the *feme* was sole administratrix to A's estate, she married Barber, they sued as administrator and administratrix. Deft. prayedoyer of the letters of

administration, and pleaded in abatement that Barber is not, nor ever was administrator &c., but that said Ruth is sole administratrix &c. Plts. replied their intermarriage, by virtue whereof the said B became administrator in right of his wife and traversed, said Ruth is sole administratrix, and tendered an issue to the country; the deft. demurred, and joinder. *Respondeas ouster awarded*, and the court said, "where a *feme sole* is executrix or administratrix jointly with one or more persons, and afterwards intermarries, her power" is by statute of 1783, c. 24, sect. 19, extinguished. "But where the wife was sole administratrix, by the marriage her husband became joint administrator with her." Same as to an executrix.

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§ 24. This was replevin for goods seized by the deft., a deputy sheriff, on an execution on a judgment recovered against the goods and estate of James Lombard deceased, in the hands of his administratrix. She afterwards married the plt. Before the marriage and before the seizure by the officer, she had inventoried the goods, and settled an account of her administration, "charging herself as administratrix with the personal estate of the deceased, inventoried and appraised as by law provided," to the amount of \$567 87. Her charges of probate fees, debts paid, &c. were \$108 48. Held, the intestate's goods in her hands were liable to be seized on this execution, as she had not paid his debts to the amount of the inventory. It was agreed, if the wife acquired a property in the goods, they became her husband's by the marriage, and he rightfully replevied them; but held, she did not, merely by charging herself &c., for she might still have caused them to be sold at auction, and the goods on her death being distinguishable and known as her intestate's, would have gone to his administrator *de bonis non*.

9 Mass. R. 74,
Weeks v.
Gibbs.

§ 25. A rightful executor or administrator in this respect ought to be on as good ground as an executor *de son tort*, and it is settled, he "may discharge himself even against the demand of the rightful administrator, by proving debts paid to the amount of the goods received, which had belonged to the deceased. Plt. nonsuit. But what is meant in this case by the administrator's paying the intestate's debts to the full amount of his goods? Suppose he leave no estate but \$500 in goods, his administrator pays his debts to the amount of \$400, having inventoried the goods, settles an administration account, and the goods remain in specie and known as having been the intestate's; shall a creditor of the intestate extend his execution on the whole of them, and his administrator lose the \$400 he has paid? Shall he have no remedy but seasonably representing the estate insolvent? Or shall he retain to the amount of \$400, the sum he has paid? I understand the ex-

CH. 29. executor *de son tort* may so retain ; but there is no difficulty in
 Art. 16. this case, the executor *de son tort* may have paid creditors
 20s. in the pound, and yet the estate may be insolvent, and
 not enough left to pay the other creditors 1s. in the pound, if
 this executor may retain to the full amount of what he pays,
 which seems to be the principle ; and in his case there is no
 probate bond to be resorted to. On the whole, the true rules
 are : 1. If the estate of the deceased be solvent, then for
 such executor of his own wrong to retain as much of the de-
 ceased's estate as he pays its creditors : 2. But if insolvent,
 then for him to be in the shoes of the creditors he pays, and
 retain as much as they, if not paid by him, would have been
 entitled to in settling the insolvent estate, considering him as
 assuming their debts against it ; and taking upon himself their
 claims. These are the rules in principle and practice as to
 rightful executors and administrators.

Mass. R. 334, Smith v. Whiting jr. § 26. Assumpsit on a note made by the deft. to two persons, executors, for a debt due to their testator. One of them endorsed it to the plt. These facts appeared in the plt's. declaration. The deft. demurred to it, and had judgment. The promisees not being copartners had each but a moiety, so one could not assign the whole, nor his moiety alone.

7 D. & E. 182, Hirst v. Smith. § 27. In *assumpsit* brought by an administrator *de bonis non*, the promises may be said to have been made to the former or first administrator.

8 Johns. R. 1140, Carter v. Phelps & al. § 28. *Assumpsit* against an administrator. The plt. in his declaration stated, that the promises were made by the intestate in his life time ; and by the deft., " administrator as aforesaid," since the death of the intestate. Declaration held good, especially after verdict, it being tantamount to alleging that the promise was made by the deft. as administrator. It might be good considering the deft. merely as acknowledging as administrator the intestate's promises ; but not good as a promise *de novo* by the administrator to bind the intestate's estate, for reasons elsewhere stated at large.

11 Mass. R. 190, Freeman, Judge &c. v. Anderson & al. § 29. Held, the administration bond does not cover the administrator's neglect to procure a license to sell the real estate of the intestate for the payment of his debts. Special pleadings. The administration bond does not extend to the real estate, nor include the provision of the statute of 1783, Ch. 32, s. 8, as to waste by neglect to raise monies &c., act 1818.

11 Mass. R. 227, Perkins v. Fairfield. § 30. *Administrator's sale by license of Court of Common Pleas*. Title under it held good against the intestate's heirs, though the license was granted upon a certificate from the probate judge, not authorized by the circumstances of the case. If erroneous, it is not to be corrected at the expense of

the purchaser, who relied on the order of a competent court. CH. 29.
It is not to affect him, that enough was before sold, or the Art. 17.
administrators neglected to give bonds to account for the sale.

§ 31. Plea, *plene administravit* and issue. Held, the jury 6 Cranch 19,
must find specially the amount of the assets in the executor's Fairfax's exr.
hands; *secus* the court cannot give judgment on the verdict. v. Fairfax.

In this case several authorities were cited by counsel to shew that the judgment must be for the whole sum, if the verdict find any assets, as 8 Co. 34, Mary Shipley's case; Cro. El. 592, Waterhouse v. Woodstreet; Styles 38, Gawdy v. Ingham; Freeman 351, Oxenden v. Hobdy; Bro. Execution pl. 34, pl. 82; Godbolt 178, Newman v. Babington; Cro. Car. 373, Dorchester v. Webb; Lex Test. 414. But the chief justice, Marshall, observed, in giving the opinion of the court, "that these cases had been overruled, and that an executor is liable for the amount of assets in his hands and no more."

2. After judgment below, the deft. married; held, sufficient to serve the writ of error on her husband. And if an executor confess judgment when sued on his executorial bond, in order to sue him and his securities for a *devastavit*, he cannot apply to a court of Equity for relief, on the ground he has fully administered.

Worsham v.
M'Kinsie.

§ 32. And in Virginia if a deft. die after office judgment, his administrator on *scire facias* cannot plead *plene administravit*.

6 Cranch
184,
M'Knight v.
Craig's adm.
Toller 463 —
1 W. Bl. 400.
—Off. Ex.
185.

§ 33. An executor or administrator may make his own estate liable, by knowingly pleading a false plea, as never executor, or a release to himself, or knowingly any false plea, which if true would perpetually bar the action, and it is found against him, judgment *de bonis testatoris et si non de bonis propriis*.

ART. 17. *Where liable and entitled to actions, though the testator or intestate was not.* § 1. A covenants his executors shall pay monies, it is valid, though he himself is not liable. Debt on bond, penalty £2000, of the intestate; he in a marriage settlement covenanted that his executor or administrator should within six months after his death, pay in money or goods, out of his personal estate, £700 to A, B, &c. to the use of Sarah Longhurst for life, his intended wife. He died, and left her his widow, and the deft. administered. It was objected that the intestate owed no debt, and so his administrator is not liable, for the intestate had only covenanted, "that his executor shall pay," cited Parrott v. Austin, Cro. El. 232. Held, that the covenant was valid, and secured a real debt by *specialty*, and the intestate himself was bound in a penalty, though not liable; but without that, said Wilmot J., here is a good debt by spe-

3 Burr. 1380,
Plumer v.
Merchant,
adm.

CH. 29. cialty, and no difference whether he was to pay himself or his
Art. 18. representatives to pay.

Milburn v.
Evarts & al.

§ 2. So against executors or administrators, as Thompson v. Wood, Ch. 19, a. 1, s. 3; intestate's bond to his intended wife, that his administrator pay her &c. if she survived, though never any right of action against the intestate, nor was he held to do any act whatever, but leave the £1000 to be paid. A like case; he bound his heirs so to leave £3000, cited 5 D. & E. 381. But in each of these cases the deceased made a contract, on which a future right of action accrued to the contractee. The deceased bound himself and left a contract to be declared on.

Toller's L. of
Executors
165, 166, 437,
&c. 462, 463.

§ 3. *Grants made to executor &c. though never to his testator.* If the executor recover, he has *assets* &c. As if a lease be made to A for life, remainder to his executors for years, it is *assets* in the executor's hands and he can recover it, though it could never vest in the testator. So if a lease for years be bequeathed to A for life, and on his death to B, and B die before A, though the term were never in B, it comes to his executor, and is *assets* in his hands. So the young of cattle, and wool of sheep, produced after the testator's death, belong to his executor, and are *assets*, yet the property never vested in the testator. So the profits of trade, carried on after his death by his executor and by the testator's direction, are *assets*, 10 Vesey jr. 110; so where the cause of action accrues after the testator's death, as on a bond to him forfeited after his death, 2 Com. D. Pleader 2 D. 1; 3 Bac. Abr. 93, 94; 1 D. & E. 487; 5 Co. 31; Cro. Car. 225, 685. So the executor may sue on any contract made with him in his representative character, though the right of action never vested in the testator, as *Ellenwood v. Fluent &c. &c.* See *Auter Droit*, Ch. 9, a. 19, many cases.

15 Mass. R.
374.

§ 4. *Administrator de bonis non* brings *assumpsit*; he may lay the promise to have been made to the first administrator as *insimul computasset* between him and the deft. &c. See *Hirst v. Smith*, a. 16, s. 27, Ch. 161, a. 8, s. 4.

1 Day's Ca.
150, *Taber v.*
Packwood.

§ 5. *Where executors &c. must sue, and not heirs.* As if A devise property to B and C on condition they arrive to twenty-one, and to D for life, in the mean time B and C die; on D's death their heirs cannot sue D's executors for the property, but the executors of B and C must sue them.

3 Phil. Evid.
290.—
15 Johns. R.
208.—*Bul. N.*
P. 141 to 145,
cases.

ART. 18. *Several matters.* § 1. Where the plt. sues as executor or administrator, and the deft. pleads the general issue, he admits the plt. is executor &c., and the plt. will have no occasion to prove his capacity, nor will the deft. be allowed to deny his title to recover; *Mansfield v. Marsh*, 2 Ld. Raym. 824.

§ 2. Nor can the deft. on such plea prove there is another executor living besides the plt., this also being matter of a plea in abatement; *Watson v. King*, 4 Campb. 272; 2 Maule & Sel. 553, *Thynne v. Protheroe*; Com. D. Tit. Abatement. Ck. 29.
Art. 18.

§ 3. In debt by an administrator on a judgment recovered by him as administrator, he need not declare as administrator. So whenever he sues in his own right, and if he name himself administrator, it is surplusage; but if he claim goods as administrator, he must prove his title to them, though he sue in his own right, as he derives it from the intestate, and under the general issue the deft. may controvert the plt's. title, as in *trover &c.* 3 Taunt. 115, in *Hunt v. Stevens*. 16 Mass. R.
71, *Talmadge v. Chapel*.—
2 Phil. Evid.
291, *Marsfield v. Marsh*.

§ 4. *Acts of Limitations*. A new promise by an executor or administrator within six years takes the case out of the acts, as well when the administrator *de bonis non* is sued, as when the original executor or administrator is sued who made the promise. 16 Mass. R.
429, *Emerson v. Thompson*.

§ 5. The plt. must prove he is executor or administrator when suing as such, if the deft. plead in bar of the action, the plt. is not executor or administrator. 2 Phil. Evid.
293.

§ 6. The letters of administration are the best evidence of administration granted, and if the administrator be sued and have notice to produce them and he does not, secondary evidence may be used by the plt. *Broderip & Bingham's Reports* C. P. 219, 221. The same as to the probate of a will. In both cases there must be proof of identity; that is, that the person sued is the person named executor or administrator in the papers produced. 2 Phil. Evid.
294, 295.—
13 East 234,
Davis v. Williams.

§ 7. If the deft. plead *plene administravit*, he admits some debt due to the plt. in *assumpsit*, but not the amount, but in *debt* the amount also. And if the issue be, whether the deft. had assets when sued or since, the burden of proof is on the plt. The plt. cannot on this issue prove *assets come &c.* since the commencement of the action. This matter must be specially replied. This plea is a complete answer to the action when found for the deft., *Edwards v. Bethel*. As to the form of this plea, see 15 Johns. R. 323. 2 Phil. Evid.
295, 296. See
Ch. 223, a.
11, s. 48, in
Virginia.—
6 D. & E. 10,
11.—1 Barn.
& Ald. 264.

§ 8. *Evidence of assets* against the executor or administrator. The inventory rendered by him is, and the plt. may prove the goods in it undervalued, and if the inventory do not distinguish the *desperate* debts, the whole *prima facie* will be deemed *assets*; but the deft. does not charge himself with *assets* by admitting the plt's. debt is just, nor by submitting the demand to arbitration, nor by paying interest on it. Bull. N. P.
140.—12 East
232, *Kindesley v. Bassett*.—
5 D. & E. 6.
—17 Johns.
R. 381.

§ 9. If an executor or administrator confess a judgment, or suffer one by default, he is estopped to deny assets as to that judgment only, and must plead it as to another creditor. And 14 Johns. R.
446.—16 Do.
273.—11 Do.
21.

CH. 29.

Art. 19.

Statutes,
March 16,
1783. April
8, 1813, &c.
&c. April
12, 1819.

admission by one of several executors or administrators of a debt due from the testator &c. does not conclude the others.

ART. 19. *A concise view of the powers and duties of executors and administrators in New York.* § 1. This subject is very important, not only as it concerns a large part of the Union, but also a very commercial part. And in the laws on this subject there is seen much caution and security in settling the estates of persons deceased, that merits much attention in the other States. While New York was a colony, probate powers were vested in the Prerogative Courts, and after independence, in the Court of Probate. These were continued until 1787. The officers; a judge and surrogate or deputy. As the State increased, it became necessary to make new probate arrangements; and in 1778 the surrogate's office was instituted in the several counties. Since that time executors and administrators have principally settled such estates in the offices of the county surrogates. At first, their powers were limited mainly to proving wills and granting administrations, and from time to time by statutes enlarged, so as to enable them to license executors and administrators to sell and convey real estate whereof the deceased died seized, to pay his debts, as far as his personal estate is deficient: also to enable the surrogate to appoint guardians to minors, and to assign dower; and fully to settle such estates in most cases.

§ 2. *Administration how, and to whom granted.* In these respects New York has adopted, in substance, as Massachusetts and other States have, the rules and principles of the English statute of Ch. II, before mentioned, with some additions in regard to evidence of certain facts directed to be proved in a specified manner, which facts in Massachusetts are left to be proved as the probate judge's discretion directs. New York directs the surrogate to have proof of the death of the testator or intestate, usually by the oath of the executor or administrator, and by this alone when no other evidence of the death can be had, or when no other evidence is deemed necessary. The administrator solemnly swears, that A. B. of — (addition) died without having left any last will or testament, as far as he knows or believes, and that he will well and truly perform the duties of administrator on his estate. This oath, as all the others prescribed, is signed and recorded. Administration is granted to the widow or next of kin in the manner before stated, as soon as it can be done with propriety. The administration granted may be general or special.

§ 3. *The administrator's bond with security.* After the surrogate has heard the parties interested in the estate to be settled, (where a hearing is requested or deemed proper) as to the person or persons to be administrator or administrators, and desig-

nated the same, he requires a bond of administration with surety or sureties in the English and Massachusetts form before stated in every material part. The penalty of the bond ought to be from thirty to forty per cent. larger than the amount of the personal estate of every description. To ascertain the amount and situation of the estate, the surrogate may examine witnesses as he may think proper, and he may appoint persons to examine and report the amount on oath, and such circumstances as he may direct. Generally the sureties ought not to be connected with the family ; but this rule has its exceptions. The sureties after all their debts paid must be worth the penal sum of the bond when it is taken. And if any doubt arises as to their sufficiency, they must justify before the surrogate *visá voce* usually, but affidavits written may be by him required and filed. This last is a good provision, and ought in all cases to be in writing and recorded. In Massachusetts too little attention has been given to the sufficiency of the sureties.

§ 4. Administrator's oath and letters of administration. The oath is as above stated. His letter of administration or commission is in the English form, adopted in Massachusetts. It empowers him to do all acts necessary and proper to be done in settling the personal estate of the intestate.

§ 5. *Inventory*. This is an instrument indented, and includes the goods, chattels, and credits, which were the intestate's at his decease. This inventory is made in the presence, and with the assistance of the two appraisers, appointed and sworn by the surrogate or person appointed to swear them. The appraiser solemnly swears, that he will truly, honestly, and impartially, appraise the personal property of A. B, of &c. deceased, according to the best of his knowledge and ability. When the two appraisers are sworn, the administrator (or administrators) as the case may be, exhibits to them all the personal property of the intestate of every description, as all moveables, shares in corporations, and partnerships, property in the funds, all debts due to the intestate from all persons and bodies politic, public or private, even debts due to him on book accounts, all they appraise at their true value, and credits usually at par. To the appraiser the administrator must in detail, and fairly shew every part of the said personal property come into his possession or to his knowledge. Some have thought that creditors have the best right to be appraisers, next legatees or distributive heirs ; but this is evidently wrong, as it is as much for their interest to appraise too high, as it would be for the administrators to appraise too low. If there be any of the intestate's personal property or credits in a peculiar situation, this peculiar situation ought to be noted by the appraisers, as desperate or depreciated debts &c. In fact,

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CH. 29. this inventory must be so made as to afford the surrogate, creditors, legatees, and distributive heirs, a fair and accurate view of the intestate's personal estate of every kind; and shew as far as practicable, the true amount for which the administrator and his securities must stand responsible. This inventory the appraisers sign, as also the administrator or administrators; this and their oaths must be returned to the surrogate's office, and the administrator there presents them to the appraisers, and the surrogate causes them to swear, that this inventory contains a true and perfect account of the goods, chattels, and credits of — deceased, as far as the same have come to their possession or knowledge. All the affidavits and oaths, with the inventory, are received and filed in the surrogate's office.

§ 6. *The administrator's duty to collect all the personal estate, and to convert it into money.* This he must do as expeditiously as practicable, and to this end he must pursue all legal and prudent measures; and as fast as he can obtain monies he must pay the debts in legal order, and at the end of the year be ready if possible to pay legacies and distributive shares. But before legatees and heirs are so paid, they must give bonds to the administrator, or proper security to the amount received, to indemnify him from future and other claims which shall appear just, or be recovered by suit. The principle is the same as in Massachusetts, it every where results from the nature of the case. And if he object to its sufficiency when tendered to him, the judge or surrogate must decide, and when approved by him, he makes the proper endorsement. Debts in New York are in grades as in England, not so in Massachusetts.

§ 7. *Executors in New York.* Their powers and duties are substantially the same as those of administrators, as above stated and explained. The difference is but in this: executors must cause their testators' wills and codicils to be proved in the county in which the testator resided; if a citizen or resident die from home or abroad, it makes no difference, his *domicil* governs and is found as in other cases; but the will of an alien or non-resident must be proved by the probate judge. Any one appointed in a will to execute it, is an executor, though not called by that name. The executor calls the witnesses to prove it as in Massachusetts, and like evidence is required to prove it as in that state; and as in that, and as before stated, the executor may by common law authority do certain acts before probate, and he must as soon as practicable make the will known &c. in order to expedite the settlement of the estate, and to prevent administration being granted. In proving a will in New York the witnesses (among other things)

swear they saw the testator seal and deliver it. When witnesses to a will are interrogated in special disputed cases, their testimony is recorded; and where no other proof of it can be had, the oath alone of the executor will prove it; but this slender proof is admitted cautiously every where. After the will is proved, the surrogate or judge causes the executor to swear, the instrument is the last will and testament of — deceased, as far as he knows or believes; that he will truly and faithfully perform the duties of executor to it, by paying his just debts and funeral charges, and then the legacies contained in it, (if any) as far as his goods, chattels, and credits will extend and the law requires; that he will make a true and perfect inventory of &c.; and that he will render a just and true account &c. when thereto required. All the original papers are recorded, and copies made out under the hand of the surrogate, and seal of office affixed. These copies, as far as necessary, are the executor's authority.

§ 8. *The deceased's real estate.* Executors and administrators in New York have no more to do with this than in Massachusetts; that is, nothing except by the will, or license of court. Where the personal estate is not sufficient to pay the deceased's debts, his executor or administrator by statute, may have power to sell so much of the real estate, or of the rents and profits thereof in certain cases as will pay the debts. This power may be given in the will, or by the surrogate or probate judge: if by the surrogate, several rules must be observed: 1. An inventory must be returned: 2. An accurate account of the personal estate rendered, and of the proceeds of the sales of it: 3. A list of the creditors and of their respective debts, as far as they can be ascertained: 4. A petition to the surrogate or judge, concisely stating the case, and praying for liberty to sell so much of the real estate whereof the testator or intestate died seized, as will pay his debts &c.: 5. The executor or administrator swears, the facts stated in his petition are substantially true, according to his knowledge and belief; the same as to his account and list: 6. The petition, papers, and documents accompanying it are filed by the surrogate, and he gives an order of notice in a prescribed form, by him dated and signed, to all interested in the estate of &c. to shew cause at his office in — on — why so much of the real estate whereof he died seized shall not be sold, as will be sufficient to pay his debts. The order requires full six weeks' notice, and must be published four weeks successively, beginning six weeks before the day appointed to shew cause: 7. When the surrogate &c. orders a sale, he ascertains what part shall be sold, where all need not be sold. His order in each case is very formal and particular.

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L. s. At a court held at — on — &c., recites the petition of &c. has been presented &c. stating &c., states he issued an order of notice, &c. the notice how given —, states no objection (if none) at the day of hearing —, that on — the petitioner appeared before the said surrogate, whereon he proceeds to hear, &c. and on due examination doth find and adjudge, that the personal estate of &c. is insufficient to pay his debts, that the executor has applied it &c. to pay them, as far as &c., that it is necessary the whole of the real estate of &c. be sold for the payment of his debts: and adds, and therefore the said surrogate doth order and direct, that the whole of the real estate whereof the said — died seized be sold, that the said executor make return of his proceedings, &c. to the end the same sale be examined &c., and if found to be legally made &c. that the said surrogate shall issue a further order, confirming such sale, and direct conveyances to be made &c. according to the provision of the act (of April 12, 1819) entitled &c., and that the monies arising &c. after the confirmation &c., and the execution of the conveyance &c. be brought into the office of said surrogate of the city and county of New York.

Another order of sale, nearly in the form of the last above, except after citing the application of the personal estate, describes the estate the testator died seized of, and adds, it is so circumstanced, that a part cannot be sold without manifest prejudice to the heirs of the said deceased; so orders a sale and return for confirmation &c., as above, and adds, after paying debts &c. to distribute the overplus &c. among the heirs &c. Other forms of long orders of sale, are forms in the New York practice, varying from the above, each as to some particular matter. After an order of sale is so obtained, the executor or administrator must advertise for six weeks the property is for sale at public vendue, in newspapers named, also notices posted. The conditions of sale fully describe the estate to be sold and the terms of sale. The sale must be completed before sunset &c., and the said conditions must be returned to the surrogate with the return of the proceedings of the sale. Proof must be made of the notice to sell, and it is best to add the auctioneer's affidavit, stating the proceedings at the sale and the result of it. The return of the executor or administrator is signed and sworn to by him; it must contain all the facts briefly and clearly stated. The surrogate examines all the proceedings, and if no objection be made, confirms the sale, and gives a further order authorizing a conveyance. This last order very concisely states all the proceedings, beginning with the letter of administration, that the sale has been legal, &c. confirms &c.; then follows the deed

containing all the orders *verbatim* from first to last. If the estate sold be not sufficient to pay all the debts, the surrogate assigns to each creditor his proportion as in cases of insolvency, after several months' delay, occupied by proceedings as prolix and expensive as those above stated in this article. But as dilatory and expensive as these proceedings, in selling the real estate, or in leasing or mortgaging it to raise monies in certain cases where minors are interested, are, the security found in such proceedings may more than balance the evils arising from such delay and expense.

§ 9. It will be observed, that these proceedings in New York in the cases of executors and administrators, are founded on statutes of that state principally, and are to be considered in connexion with the common law there in force on these subjects, which common law is largely stated in the preceding articles in this chapter, and in chapter 149, in which probate bond and many probate matters are considered. This portion of the common law, with many New York decisions as to executors and administrators stated in this work, with said statute matters, will afford a pretty full view of the law of New York in relation to the powers and duties of executors and administrators, and suits and proceedings by and against them. These proceedings valuable in principle, but in form prolix, may easily be shortened by avoiding numerous repetitions in almost every paper, the less necessary as almost every part becomes a matter of record. See the Laws of Maine as to Executors, Administrators, and Guardians, Ch. 51 and 52, pp. 159 to 197.

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CHAPTER XXX.

ASSUMPSIT BY AND AGAINST FACTORS.

ART. 1. § 1. A factor is created by merchants' letters, and has a salary or factorage, and must answer a loss incurred by his exceeding his commission; as by shipping goods to a wrong port, selling below the price ordered, or buying above, &c.

§ 2. A factor's rights and duties, or powers and obligations, result not only from the principles of contracts in general, but from his peculiar trust and situation in commerce. He may sell *perishable* articles without instructions.

2 Mod. 100.—
Mal. Lex.
Mer. 81, 82,
83.—1 Ves.
510.—Eq. Ca.
Abr. 369.—
10 Mod. 144.

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Art. 2.

Jones 145.—
Bul. N. P. 71,
130.—Imp.
M. P. 206.

§ 3. A factor is not liable in all events, as a carrier is; but is liable on the principles of bailment, before stated, in general; therefore, he is not liable when robbed, if he do the best in his power; and such is his interest, he is a witness for either party to prove the contract, though he has 1s. in the pound on the sales. He is a mere go-between. An agent for collecting debts merely, is not one within the Virginia limitations act. 3 Cranch 454.

Bul. N. P.
130, Gonsales
v. Sladen.—
2 Stra. 1182.
—1 Esp. 107,

§ 4. *The nature of a factor's contracts.* If my factor beyond sea, buy goods for me, *assumpsit* lies against him, and if he sell my goods, he may have *assumpsit* in his own name; for the credit will be presumed to be given to him, and the promise made by him, and the rather, as it is so much for the benefit of trade. His implied powers considered, 13 Mass. R. 178, 182.

1 East 48, 53.
—Cooper's
R. 176.—2
Atk. 394.—
1 D. & E.
285.

§ 5. By a general rule of law, however, his sale creates a contract, *between me and the buyer*. Hence, if a factor sell for payment at a future day, and the owner give notice to the buyer to pay him, and not the factor, the buyer cannot, after this, pay the factor. This rule may not hold if the factor sell at his own risk, and so is liable to the owner, though the buyer never pay; "for in such case he is debtor to the owner, and not the buyer:" but this last position has been questioned since, and on the whole overruled.

1 Esp. 106,
109, Escot v.
Milward.

§ 6. For where in June, 1783, a cargo of wheat was consigned from Ostend to the plts., and they employed one Farrer, as their factor, to sell it; it was proved that factors in this trade have a *del credere* commission, besides factorage, and never, except the factor fails, make the buyer's name known to the owners. June 9, Farrer sold two hundred quarters of this wheat to the deft. June 16, Farrer delivered to the plts. the wheat not sold, and the names of those who bought the rest; among others, the deft. Milward's name. June 20, Farrer failed. The deft. claimed a right to off-set with Farrer, but judgment was for the plts. See 2 Stra. 182.

3 Wils. 73.
94, Godfrey
v. Saunders.

§ 7. In this case it was decided, that every consignment to two factors jointly, imports the consignor's assent for them to trust each other, with all the goods; but both are accountable for the whole, and joint factors are as co-obligors, and answerable for one another for the whole.

2 Selw. 718,
719.—Whites
406.—1 Esp.
109.

§ 8. A factor, to act faithfully, must do with his principal's goods and debts, as a prudent man would do with his own; and he is a factor *del credere*, when he guarantees the credit of the buyer; and he may sell on credit, though not specially authorized by his commission, when according to the usage of trade in the place.

2 W. Bl. 1154,
Tinch v.

ART. 2. *His lien.* § 1. A factor has a lien on goods consign-

Walker, cited 1 Esp. 109.—1 Burr. 493.—2 East 227.—3 D. & E. 119, 123. See Lien.

ed to him, for his own demands. And when goods consigned to him remain *in specie*, they are not subject to his *bankruptcy*. So if a bill be remitted to him for a *special purpose*, and be not disposed of or paid away, when he becomes a *bankrupt*, it will be considered as the principal's, and by him recoverable in *assumpsit*, but subject to the *factor's lien*; but he must have actual possession.

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§ 2. In this case *assumpsit* was brought by the plts. for money had and received by the defts. The plts. were assignees of the bankrupt. The defts. were his factors. He consigned goods to them, which as his factors they sold, and the proceeds in their hands were £5314. 17s. 9d.; they paid several sums to his order, and on his account. All these transactions took place between his committing several secret acts of bankruptcy, in December, 1751, (after which he appeared abroad as usual) and his stopping payment, August, 1752. Lord Mansfield and the court said, a factor has a *lien* for commissions and expenses. "So on goods consigned, while they remain in his possession, for the items of *general account* with his principal;" but here the goods have been sold and turned into money.

2 Burr. 931,
Foxcraft &
al. assignees
of S. a bank-
rupt v. De-
vonshire, cit-
ed 2 Mor.
275 to 292.

§ 3. If a creditor knows a trader is likely to break, and conceals it, and secures his own debt, even by threats of legal process, the law says this is no fraud. If a factor knows the circumstances of his principal to be desperate, and advances money on his bills to save him from immediate failure, it is no fraud, but a meritorious act; none but the lender can suffer by it. And if the factor trust to the arrival of goods to reimburse him, it is prudent, but no fraud. It is a paradox to say a man is guilty of a *fraud*, who lends his money, only with a prospect of being repaid. Men every where lend their money to traders on mortgages, consignments, and securities; because they suspect their circumstances, and will not run the risk of the general credit. A new trial was granted on the ground the defts. had a *lien*, not only for their commissions and charges on the sale, but for their said advances.

§ 4. If a bill be drawn on a factor, and payable out of goods in his hands, after paying prior acceptances, and this bill is accepted by him generally, he must pay it, though there be a balance due to him, in a running account with his principal. By his special promise he gives up his lien.

2 W. Bl. 1072.
Maber v.
Massias.

§ 5. This idea that a factor has a *lien* on goods while in his possession, has been extended even to the *proceeds of them*, and any action by him, or against him, may be affected accordingly. Cowp. 254.

See post, art.
8.

§ 6. In this case it was decided that a dyer not acting as a

4 Burr. 2214,
Green v. Far-
Burch.

mer.—Same, W. B. 651.—6 T. R. 258. Walker v.

CH. 30. *factor*, but merely as a *manufacturer*, has a *lien* only for dying
 Art. 3. the *same goods*, and not for other debts. If A deposit goods
 with B for sale, and B promises to pay the proceeds to A
 when sold, B has no lien on them, if not sold, for his balance
 of his general account, arising from *other* articles; for he de-
 prives himself of this lien by his special promises to pay over
 the proceeds.

3 T. R. 119.
 783, Kinloch
 & al. assign-
 ees of Sande-
 man, v. Craig.

ART. 3. *Assumpsit* by and against a factor; *goods in transi-
 tu*, &c. § 1. In this case Steine, the bankrupt, in Scotland, sent
 a cargo of spirit thence to London by sea, to Sandiman & Co.
 in the course of his trade with them, and drew bills on them
 which they accepted, in confidence of receiving the cargo.
 They had £1200 a year in lieu of commission, and one fourth
 per cent. commissions, and five per cent. for monies advanced;
 bills of lading were sometimes sent, but more generally, not.
 When the said cargo arrived, Sandiman & Co. were under
 acceptances for £29,000, on account of Steine, £1200
 whereof was for this very cargo; before which time they had
 received the bills of this cargo, *unendorsed*, and an invoice of
 the goods; and February 15, 1788, had insured the cargo in
 their own names, and at their own expense. This ship arriv-
 ed February 21, the day after Sandiman & Co. had stopped
 payment; at which time they told the captain they were bank-
 rupts, and did not think themselves authorized to meddle with
 the cargo; March 8, they paid him six guineas in part of the
 freight; March 15, he for the first time refused to deliver the
 goods to the assignees of Sandiman & Co. Steine had writ-
 ten to them to unload when the ship arrived; their bill had
 not been paid; Steine stopped payment February 23; and
 March 3, a sequestration was granted, under which Craig stop-
 ped the goods and sold them.

Judgment for Craig, the debt., in favour of the title of
 Steine, the consignor: First, because the consignor may stop
 goods in case of the *insolvency of the consignee*, before they
get into his actual possession; for the contract between them
 is founded on the idea that the consignee is able to pay for
 them. A constructive possession is not sufficient.

Second. *The acceptance of a bill* is never held equivalent
 to *payment*; for in case of the *insolvency of the acceptor*, the
 drawer most probably must pay it.

Third. A factor has a *lien* on all consignments for a *gene-
 ral balance*, with this restriction, that he has obtained actual
possession of the cargo.

Fourth. Payment of a part of the freight cannot be con-
 sidered as taking possession of the goods.

Fifth. The captain could only deliver the goods to Sandi-

man & Co., *as factors*, for without an endorsement of the bill of lading, he could not deliver the goods to them *as owners*. CH. 30.
Art 4.

Sixth. If Sandiman & Co. had once *got possession*, then they might have insisted on their *lien*, and so far in this action have recovered the *proceeds*. The above judgment was affirmed in the House of Lords: and

Seventh. Held farther, to be a case between *principal* and *factor*; so *stopping in transitu* was out of the question, which applies only as between *vendor* and *vendee*, as in 4 Burr. &c. Consignment above.

ART. 4. *Case for not making insurance &c.* § 1. If the principal order the factor to insure the goods, and he have monies of his principal's in his hands to pay the premium, and he neglects the insurance and gives no notice, he shall pay the loss; see *Abrahams v. Davenport*, art. 11. 4Burr. 2050,
Wright v.
Campbell.
Mal. Lex
Mer. 86.

§ 2. This was an action of the case for not insuring. In Feb. 1785, the plt. owing the deft. £850, mortgaged to him the plt's. interest in the goods and freight, to pay August 1785. In July, 1785, the plt. in a letter enclosing the bill of lading, directed the deft. to get insurance on the goods and freight, being shipped from Dominico to London. This direction could not have been received before the mortgage became absolute. The deft. got insurance on the goods, but not on the freight; the proof was, that the deft. received a letter from the plt. Verdict for the plt.; and a new trial was refused on these principles: 2 T. R. 187,
Smith v. Lascelles.

First. The plt. had an insurable interest in his right to redeem.

Second. The application to the deft. to insure was in the usual course of trade, and he gave no notice of his dissent.

Buller J. stated three general principles. First, "where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect he will obey an order to insure; because he has a right to call these effects out of the other's hands when, and in what manner he pleases."

Second. "Where the merchant abroad has no effects in the hands of his correspondent, yet if the course of dealing between them be such, that the one has used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing."

Third. "If the merchant abroad send bills of lading to his correspondent here, he may ingraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction." Here the deft. could not accept

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2 T. R. 198,
Wallace v.
Telfair.
Smith v. Co-
logan.—
2 Vesey 239,
Tuhai v.
Short.

Mal. Lex
Mer. 82.—
Reeves' D. R.
350.—Ca. Ch.
25, 76.—
2 Vesey 39.—
Malloy 423.

Mal. Lex
Mer. 83, 103.
—Chan. Ca.
76.

3 Salk. 235.

5 Com. D. 50.
—Ca. Ch. 30.

Cro. J. 265,
Lawson v.
Kirk.

3 Mass. R.
436, Welman
v. Nutting,
admr.

4 Mass. R.
115, Bridge v.
Austin.

the bill of lading, and reject the insurance, the same if the debts had limited the broker to too small a premium, and hence no insurance. So if the factor make a blunder in the policy by which it is void; but he is not liable if he act diligently, and in the usual mode of doing business. But if a merchant direct his factor to insure, and he charges him with it as if done, and a loss happens, he is liable as insurer, but not as his agent.

ART. 5. *Factor answerable when he saves his own debt.* If my factor sell his goods to A, payable at a future period on his own account and is paid at the time, and in the mean time lets my monies lie in A's hands unpaid, for goods such factor formerly sold, he shall answer for my monies, though he never receive them; for it is a fraud in him to neglect my debt when he collects his own. If he run his principal's goods or makes a false entry, he is answerable.

When a factor may sue in his own name for the use of the principal, see post, art. 11.

ART. 6. *Where liable or not, on account of duties saved.*

§ 1. If a factor unawares or of purpose save the duties, and thereby the goods are forfeited, and this without the privity of the principal, he shall answer the value of them to the principal; otherwise, if the factor enter according to his letter of advice, or invoice. So if the factor take usury, he is liable if the debt be lost.

§ 2. A factor of the East India company carried £1200 in gold to India, and there saved the duties due on it, and it was held, that this was at his peril, and that he and not the company should have the benefit of saving the duties, for they were bound to pay them, and therefore cannot make title to them against one who has the possession.

§ 3. But it is otherwise if the factor does not pay the duties to his own government. And if he falsely enter his principal's goods at the custom-house, or run them, whereby they are seized, the factor must make good all the principal suffers, though the factor's commission be general.

§ 4. In this case the court decided, that if a factor abroad runs goods of his principal, and loses them by seizure, he must answer for them to him, unless, first, he conforms to the law of the place; or second, he was specially authorized by his principal to do as he did; or third, the property could not be otherwise managed, and that this fact was known to his principal when he made the consignment.

§ 5. Held, that if one at his own risk engage to transport goods against all dangers but those of the sea, and they are stolen ashore, he is liable to account to the consignor for the

value at the place of shipment, deducting the agreed commission.

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Where a third person is discharged of his promise to account for goods to the factor, by accounting for them to the owner, Ch. 9, a. 5, s. 10.

ART. 7. A factor cannot pawn for his own debt his principal's goods, or goods entrusted to him for sale, 5 Vesey jr. 211. Agent cannot pledge his principal's stock.

Stra. 1178, Paterson v. Tash.—5 T. R. 614, Daubigny v. Duval.—7 East 5, M'Combie v. Davies. 1 Bos. & P. 648.—1 H. Bl. 362.

§ 1. In the year 1792, the plts. consigned goods to a broker to be sold by him as their factor. In 1793, he pledged these with the defts. for £325. Judgment for the plts.; and held, that they need only tender to the factor what they owed him; but need not tender his debt to the pledgee in order to recover the goods, for the factor's power was to sell, not pledge his principal's goods.

§ 2. In this case the plts. put into the hands of A. Carter, a retail shopkeeper, the goods in question, under an agreement between him and the plts., that all goods so put into his hands should be sold on their account and risk, and should all be distinctly marked with a large K, and kept separate from Carter's own goods. When any of them should be sold, the bills of parcels were to be so marked to shew they were the plt's. goods, so all monies or notes were to be immediately paid to them, and Carter was to be allowed a commission of five per cent., and an additional allowance in case a certain profit specified was made. Carter borrowed monies on his own account of the defts., and pawned these goods as collateral security, and delivered them, and the pawnees were to sell them if the terms of the loan were not complied with. The defts. were ignorant of the plt's. interest in the goods. Carter failed, and the plts. demanded these goods of the defts., the pawnees, and recovered in trover; though it was urged that the defts. had reason to think the goods were Carter's, who kept an open shop in which these goods were exposed to sale with his own.

2 Mass. R. 398, Kinder v. Shaw.—1 East 335.—6 East 17, 538. *Secus* as to bills endorsed blank.—1 Bos. & P. 648, Collins v. Martin.—4 Johns. R. 103.—2 East 523.—1 Maule & Sel. R. 140.

§ 3. Nor can the factor pledge the goods by pledging the bill of lading, but see 1 Bos. & P. 648, 651, as to endorsed bills pledged, and to the amount of his lien.

6 East 17, 44, Newsom v. Thornton.

ART. 8. *Where the price of goods sold is the factor's or the principal's.*

§ 1. *Assumpsit*, money had and received. Plts., partners beyond sea, consigned tar to Scott, (other than the plt.) the bankrupt, as their factor. He sold it to C. & J. Owen, agreed to deduct £31 he owed them, and took their notes for the balance, payable in four months. He became a bankrupt five days after the sale of the tar, and delivered the notes to his assignees, the defts., who received the monies due on them, and confirmed his sales; also received the bounty money allowed to importers.

7 East 5—Willes 400, 408, Scott & al. v. Surman & al defts. assignees. A. D. 1742.

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Judgment for the plts. for £327. 10s. the proceeds of the tar, deducting freight and charges, and £31. This off-set for £31 being the same as if Scott had received £31 in money before he became a bankrupt. Also held,

First. If the price of the tar had been paid to the bankrupt before his bankruptcy, and had not been laid out by him in any specific thing to distinguish it from the rest of his estate, the plts. could not recover in this action, but must come in as creditors, for money has no *ear mark*.

Second. If the goods had remained in specie unsold in the bankrupt's hands at the time of his bankruptcy, the plts. might have recovered them, for they may be distinguished from his, and said notes are within the same reason.

Third. The rule is, if I receive money to pay to another, or to apply to a particular purpose, and do not, I am liable to this action. The money received on the notes, and bounty by the debts., belonged to the plts. and ought not to be applied to pay the bankrupt's debts.

Gurrall v.
Cullum.

Fourth. Cites Gurrall v. Cullum. Plt. in Ireland employed B. & M. as his factors in London to sell his goods; they sold a parcel to J. S. for £20. The plt. did not know to whom the goods were sold, nor J. S. whose goods they were, but they were delivered to him as the goods of B. & M., and so charged. Before this £20 was paid, B. & M., the factors, became bankrupts, and the debt., their assignee, received this £20 of J. S. the buyer. The plt. sued for money had and received, and recovered against the debt., the factor's assignee, for the £20 was not due to him, but his principal, the owner of the goods. And a factor has no lien as to debts accrued before he becomes factor.

2 W. Bl. 1154.
Jink v. Wal-
ler & al., as-
signees of
Jenner.

§ 2. In this case for money had and received, the court held that bills remitted to a factor or banker, while unpaid, are in the nature of goods unsold; and if the factor become a bankrupt, they must be returned to his principal, subject to such *lien* as the factor may have on them. The question made was, whether the bills remitted to Jenner, the bankrupt, were to be considered as money paid to him, or as goods, merely deposited in his hands, as factor or agent to the plt., who sent to him the bills. Adjudged to be as goods so deposited.

5 T. R. 215.—
Reeves D. R.
350.—1 Salk.
160.

§ 3. The principal sent gold to his factor for a *particular* purpose; he failed and the principal recovered it back: and the same principle holds as to monies, if identified by some mark.

1 Ves. 609,
Cornwallis v.
Wilson.

§ 4. A in London ordered *his factor* at Ostend, to buy him goods, at a *stated* price, which he *exceeded*, and sent them. A refused the contract, but sold the goods as *his own*, and at a

risk. A is not a factor in this, but having accepted and sold them *as his own*, he was held liable to his factor abroad, at the price he gave, and that this factor might have *assumpsit* for the price of the goods.

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§ 5. If a factor who sells under a *del credere* commission sells goods *as his own*, and the *principal* is not known to the buyer, he may off-set any demand he has on the factor, in part pay for the goods, when sued by the principal. In this case the factor has the price, so far only as he owes the buyer. And this off-set operates as payment as far as it goes.

7 T. R. 359,
George v.
Claggett.—
7 D. & E. 359.
—2 Bos. & P.
489.—1 Bac.
299.

§ 6. Dowding, a clothier, employed Jeffries as *his factor*, and borrowed £3000 on the credit of A, and got Jeffries to join, as surety in the bonds for this sum, on agreeing to vest said monies in cloths and to send them to Jeffries, *his factor*, who, *as factor*, sold the cloths marked J. Dowding, to the deft. before Dowding committed any act of bankruptcy, but did not receive the money for them until after the action was brought. *The deft. knew Jeffries to be factor.* He sold in his own name, and in the usual course of business. Dowding's assignees, the plts., gave notice to Goodwin not to pay the monies to Jeffries, but Goodwin paid them to him, after this notice.

Cowp 251,
Drinkwater
& al. assignees of Dowding, v. Goodwin.

Assumpsit for goods sold &c. was brought, and judgment for the deft. The plts. argued that Jeffries, the factor, was not a creditor to Dowding, the principal, when the action was commenced, as the factor had not paid as such security, and that he had *no lien* on the price, *which is a tie on the thing*, and holds only, while it is in the custody of the party; but here the factor has sold the goods, and *parted with the possession*, and so has lost his lien; but

Lord Mansfield and the court decided that the deft., the buyer, held the money; the factor and assignees of the principal were disputing about it. After notice to the deft., and indemnity offered, he was bound to hold his hand, and became liable to the true owner. The factor "claims the money as having a *lien* upon it." "We think a factor who receives cloths, and is authorized to sell them *in his own name*, but makes the buyer debtor to *himself*, though he is not answerable for the debts, yet he has a right to receive the money: his receipt is a discharge to the buyer, and he has a right to bring an action against him to compel the payment." The principal can sue the buyer for the price, only "*where the factor has nothing due to him.*" Here the factor had a *lien by agreement*. And after stating some other matters, the court said, "therefore, we are all most clearly of opinion, that the factor has a *lien* on the price of goods in the hands of the buyer."

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Art. 9.

Mass. S. Jud.
Court, June
1796, Essex,
Allen v.
Pierce, jr.

§ 7. In this case Allen brought two hhds. of sugar from the West-Indies, and stored them in Gloucester, and then sent them by one Bishop, a coaster, to Boston, to be sold by Bishop, as a factor. He not immediately finding a market, January 25, 1795, put the sugars into the debt's store, on the long wharf in Boston. February 3, 1795, he sold them and received the money, and passed it to Bishop's credit, who owed him the amount. Allen sued Pierce for money had and received; and the court held,

First. Where a factor, or one trusted with my property to sell, sells it to A and receives the money, A is not afterwards liable to pay me, the real owner of the goods, though my factor misapply the money, or converts it to his own use.

Second. If one, so being factor, sell my goods to A, and before A has paid the factor, I give him notice the goods were mine, and demand payment; after that A pays the factor at his peril; and if he pays him, he will be held to pay me also.

Third. It is not material whether A, on buying the goods of my factor, pay him the money, or take them at an agreed price, in payment of the factor's debt, or take them in payment of such debt, at a price afterwards to be fixed.

Fourth. The main point: if A, who buys the goods of my factor, when he buys, or has reason before he pays him to believe the goods are mine, and not the factor's property, and afterwards passes the proceeds to the factor's credit, in discharge of his debt, yet A shall pay me, and may take back his credit given to the factor.

Bishop was admitted as a witness, and testified that when he delivered the sugars into Pierce's store, he told him they belonged to Allen. Judgment for him; for if Pierce bought them of Bishop, the fact was proved that he (Pierce) was informed they were Allen's property before they were sold, and the buyer cannot set-off with the factor, when the buyer knows the goods are his principal's. 2 Cain. Er. 341, Brown & al. v. Robinson & al.

ART. 9. *Where the factor will be deemed to have acted on his own account.*

§ 1. If a factor by order of a merchant buy goods above the price set to him, or not of the quality directed, the merchant may disclaim them, and the factor must keep them on his own account.

§ 2. So if he buy according to his orders, but ships them to another place than the one directed. So if he sell an article below the price directed to him, he must make good the loss, unless he can give a good reason for his conduct.

Mal. Lex.
Mer. 82, 83:
—5 Com. D.
Merchant B.

—2 Mod. 100.
—10 Mod.
144.

§ 3. So if he buy goods according to orders and then the price rises, and he fraudulently send them to another, against his orders, and take the benefit of the rise of price, the merchant shall recover damages against him by the law merchant. So if he by his principal's advice, or with his money or credit, buy goods on his account, and give no notice thereof to him, but sells them on his, the factor's, account and benefit, the principal shall recover the benefits.

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§ 4. So if the factor sell his principal's goods to a man *discredited*, and who cannot usually buy goods at the ordinary price, as others can, and he fails, the factor shall pay his principal for the goods, unless he can prove he was ignorant of the party's insolvent condition, or that he sold him goods of his own, &c; or that he had a commission from his principal, to deal with him as if it were for his own proper goods.

And a factor of common right is to sell for ready money, unless the usage be otherwise, and even perishable goods. Willes 406; 3 Bos. & P. 489; 1 Bay. 294; 3 Johns. R. 314; 2 Cain. Er. 341.

12 Mod. 514.
Rex v. Leo.

§ 5. In this case A, a factor, sold B's goods in his own name to C; he, without paying for them, sent another parcel to A to sell for C, not having employed A as a factor before. C became a bankrupt, and his assignees claimed the goods, C so sent to A, which remained unsold, tendering the charges on them. A refused to deliver them, claiming a *lien* on them for the price of his goods he had sent to C, and sold to him; the balance between A and B being in A's favour. C's assignees recovered in trover against A, for the value of the goods sent him by C.

3 Bos. & P.
485, Hough-
ton & al. v.
Matthews.

§ 6. If the factor sells the principal's goods at a less price than directed, yet the buyer holds them; and the factor in his own name may sue him, and though the buyer knew they were the principal's.

Reeves' D. R.
348.—Bul. N.
P. 130.

§ 7. *Brokers.* A broker sues for a commission for getting freight: it is no objection the charter-party procured was such that if the charterer failed to procure certain licenses the voyage would be illegal. 5 Taunt. R. 521, 529, Haines v. Bush.

§ 8. The owner of goods consigns them to A, directing him to pay the net proceeds to B; A employs C, a broker, to sell them and receive the money; B can recover from C only the proceeds, subject to the same deductions and allowances as A was entitled to make in account with the owner consigning them. 5 Taunt. R. 584, 587, Blackburn v. Kymer.

§ 9. A broker is employed to sell goods, and sells them for a bill at two months, and himself draws on the buyer for the

CH. 30. amount ; he is answerable on the bill to the principal. 5 Taunt.
 Art. 10. R. 749, 751, LeFevre v. Lloyd.

§ 10. The plts. consigned goods to their factor, who for want of funds to pay freight and duties, agreed with the defts. to take charge of the goods, pay the freight and duties, and sell the goods, and have half of the commissions on the sale ; defts. paid the freight and duties and received the goods ; after which the factor become a bankrupt, having before told the defts. the goods were the plts', but the deft sold them. Held, in trover, the defts. could not retain for freight and duties, after deducting the balance due from the factor to the plts. at the time of the bankruptcy. 2 Maule & Sel. R. 298, 301, Solley & al. v. Rathbone. The agreement with the defts. was a fraud on the plts. : there was no privity between them and the defts.

10 Johns. R. 286, 286, Ferreis v. Paris & al.

§ 11. The plt., a merchant of New-York, brought *assumpsit* to recover of the defts., merchants in Martinique, the proceeds of goods consigned ; and held, if a factor or consignee inform his principal of the sale of his goods, consigned to the factor &c., he may wait the principal's direction, as to the mode of remittance of the proceeds ; and is not liable to an action, till in default, in not remitting the proceeds, or paying them according to his principal's order. The defts. often asked for orders, and it seems they conducted according to the course of that trade.

Co. L. 89—
 3 Bac. Abr. 568, see Bailments.

ART. 10. *Account at common law lies against a factor as against a bailiff ; and he has his reasonable allowance.*

§ 1. And it is a good discharge before auditors to say the ship was overloaded, and the goods thrown overboard in a tempest. Also, that he was robbed of them without his fault or negligence.

§ 2. Where a factor may sue, or be sued in his own name ; see art. 1, Gonzales v. Sladen & al. Where he may be a witness ; see above, and Peake on Evidence ; and Evidence, post.

Bul. N. P. 130—2 Stra. 1182.—1 Esp. 107, 108.

§ 3. Generally a factor's sale creates a contract between the owner and buyer. Hence, if the factor sells for payment at a future day, and the owner gives notice to the buyer to pay him, the owner may recover ; but it may be otherwise, if the factor sells the goods at his own risk : that is, to be liable to the owner at all events, and if the buyer never pay. This may be the case if the owner give a *del credere commission* ; for then such a sale is in pursuance of his authority ; but if there be no such commission, it is difficult to see how the factor, by so selling, can limit to himself the owner's security.

§ 4. A factor can never sue or be sued, or plead in *auter droit*. If he sue or be suable at all, it is in his own right, upon

his own contracts. Hence, in pleading, the only question peculiar to him, is the question, when he may *himself* sue or be sued in *his own name*; or when his principal must sue or be sued. But if the principal call on the buyer of the factor to pay the principal, he gives up his claim against the factor, for not pursuing his instructions; as by calling on the buyer he ratifies the factor's sale. Reeves' D. R. 348; Bul. N. P. 130; 7 D. & E. 359.

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Art. 11.



ART. 11. *Further American cases.*

§ 1. In this case the court decided, that where A sent certain lottery tickets to B, for sale, with a request to put them into such hands as B should think safe, this was not an authority to sell the tickets on credit at A's risk. 3 Mass. R. 211, Brown v. Bull.

§ 2. In this case Pearce, the deft. sent his ship, Samuel Calder master, to St. Petersburg; there, June 19, 1803, Calder, according to orders, drew bills on Pearce for 25,000 rubles, balance of cargo received from Blandow & Co. for Pearce, payable at Amsterdam, at Messrs. Van Staphorst & Co. June 23, 1803, Blandow & Co. endorsed said bills to the plts. thus, "pay to the order of Messrs. Van Staphorst & Co. value in account. St. Petersburg, June 23, 1803, (signed) Blandow & Co." No payee was named in the bills, but they were delivered to Blandow & Co. who, as above, endorsed them to the plts.; who as agents of Blandow & Co. sent them to the deft. who accepted them. The third count stated the contract as a bill drawn by Blandow & Co. on Pearce in favour of the plts., and accepted. And on this count the plts. recovered, "because every endorsement of a bill may be considered as a new bill drawn by the endorser on the acceptor in favour of the payee;" and "upon an express promise to pay the factor of any one for the use of the principal, the factor may maintain an action in his own name." "And as the endorsement expresses value in account, if the endorsee holds it for the use of the endorser, he is his factor as to this bill." "If Pearce had after his acceptance paid the bill to the principals, [Blandow & Co.] he might be allowed to avail himself of such payment against the factor." And the creditors of Blandow & Co. could not discharge Pearce from his express promise made to the factors of their debtors. Pearce was also sued as trustee of Blandow & Co. 4 Mass. R. 258, Van Staphorst v. Pearce.

§ 3. In this case the court held, that when A, owner of a ship abroad, directed B, his factor here, to get insurance on her, and he could not in his town or vicinity, nor did he obtain it in more distant places, where he limited the premium below what it could be done for, B was not liable to the owner for not having got the insurance. The defts. lived in Boston, and the distant place was New York. 6 Mass. R. 258, Abraham v. Davenport.

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Art. 11.

7 Mass. R. 36,
Goodenow
v. Tyler.

§ 4. The deft. was a commission merchant in Boston, and sold as the factor to the plt. a pipe of gin to one Joseph Chapin for \$81 36, and in payment took his note payable to the deft. or order in ninety days. Chapin failed before the note became payable, and never paid any dividend among his creditors. The plt. gave no particular orders as to selling on credit. It was proved to be the custom in Boston, and particularly at the deft's. store, to sell on credit by factors, and at the risk of their principals, unless an additional premium was allowed for taking the risk upon themselves. Verdict for the plt., because the deft. had received from Chapin a negotiable note; and a new trial was granted. And also held, that evidence ought to have been admitted to prove it was the usage for factors to take such notes in such cases on the account of their principals; though it was allowed that such a note taken for goods sold, is payment as much as cash, and that by it the original contract was merged and discharged. And the Chief Justice was of opinion, that the deft. was not liable, on general principles, independent of any usage in Boston.

The majority of the court went on the principle, that the deft. received the note in trust for the plt., and would have become personally liable to him for the amount of the gin, if, first, he had neglected seasonably to collect the note: 2. If he had sold or disposed of it: and 3. If he had refused to assign it to the plt. on his demanding it and offering to pay the deft. his commission and charges, and allowing an endorsement that would not have made the plt. personally liable; for in either of these cases the deft., the factor, would have made the note his own.

7 Mass. R.
319. Kelley v.
Munson.
Sugden's
Ven. 32.—
13 East 432.

§ 5. *Assumpsit* for the proceeds of eighteen hogsheads of molasses, the property of the plt., sent by his factor to the deft. and claimed by the factor. Notice to the deft. not to pay him. Held, first, a sale by a factor creates a contract between the owner of the property and the purchasers: 2 If on credit, the buyer may not pay the factor after notice from the owner not to pay him; except, 3. Where the factor sells in his own name and is responsible to the owner for the price, collected or not: or 4. Where he sells to his own creditor, there being mutual dealings between them. Judgment for the plt.

§ 6. It is said in some books, it is doubtful how far a factor may sell on credit. It is true there are authorities both ways; but the general principle is on the whole settled, that a factor cannot sell on credit, except there be a usage and course of trade to justify him in so doing, and where there is, principal and factor are presumed to know the usage and to understand the business will be done according to it.

Reeves' D. R.
349.

§ 7. If a factor purchase goods at a price higher than his

instructions from his principal, but he receives and sells them at a less price, he must account with his factor at the price he gave ; for by receiving and selling the goods he adopts the factor's purchase, and waives his right to reject them ; and this, though he declares he will not allow the factor's purchase. And the principal will not be permitted to say he received and sold them as the factor's agent.

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§ 8. One as a factor receives goods to sell for another, and no special orders given to sell for cash or not on credit. Held, he may sell on credit for the period usual in that market, and selling on credit in the usual way, and using due diligence to ascertain the buyer's solvency, if he prove insolvent the factor will not be liable ; but he is always liable for his due diligence or want of it.

6 Johns. R.
69, 73, Van
Allen v. Van-
derpoort. See
a. 8, s. 1.—
Also 6 D. &
E. 12, 13.

§ 9. Wherever the factor by his own acts, by mistakes, or by breach of trust or of orders, substitutes himself in the place of the principal's debtor or the vendee of goods of the principal sold by the factor, he on the one hand is liable to all the engagements of such debtor or vendee, and on the other has every defence when sued, such vendee or debtor would have if sued, either by shewing fraud or any other matter of defence. Therefore, if the factor sell his principal's goods by his express direction to A on credit, and the factor takes his note, and refuses to deliver it to his principal when demanded, the factor by such refusal is guilty of a breach of trust and substitutes himself in A's place and becomes liable to his principal for the contents of the note of A, and whatever defence A would have if sued on it, the factor has, and he retains his right to deduct his commissions &c. as factor.

1 Johns. Ca.
437, Le Grun
v. Gouver-
neur & al—
4 Johns. R.
103, 113.

So if the insured employ a factor or agent to settle with the underwriter for a total loss on a legal abandonment, and the factor misapprehend his principal's instructions, or negligently adjust the loss with the underwriter at two per cent. as an average loss and cancels the policy, the factor becomes liable to his principal for all the underwriter was liable for, that is, the total loss.

3 Johns. Ca.
36, Rundle &
v. al. Moore
& al.

§ 10. Wherever the factor has a *lien* on his principal's goods, or ship, &c. the factor may convey or deliver them to a third person for the purpose of preserving that *lien*, though he cannot pledge them.

4 Johns. R.
103.

§ 11. A merchant's factor promised he would write to his principal to get insurance done. Held, this did not bind the principal to insure ; 1 Wash. 23, Hooe & al. v. Oxley & al. ; 1 Cain. 342, Molloy 421.

3 Cranch 503,
Randolph v.
Ware.

§ 12. Where a principal gives written instructions to his factor, he will be justified in departing from them by the

3 Cranch
416, Manilla -
v. Barry.—
v. Smith.

2 Cain. 310, Drummond v. Wood.—4 Dall. 389, Walker

CH. 30. orders of a general agent. But generally, the factor must
 Art. 11. pursue his orders, and will be liable for any injury or loss
 consequent on his departing from them; 1 Bay 169, Wilkin-
 son v. Campbell; 1 John. Ca. 459; 3 Cain. 238. So a
 merchant who accepts a consignment he is not obliged to do,
 is liable for a loss which ensues, if he do not observe the or-
 ders given him. If the agent act with good faith his orders
 are liberally construed.

3 Cain. 226,
 Liotard v.
 Graves. See
 Ch. 97, a. 3.
 s. 11.

1 Johns. Ca.
 110.

2 Dall. 136.—
 4 Dall. 136.

§ 13. But a factor having no particular instructions, and in
 whom a discretion is vested, is not responsible if he act ac-
 cording to the best of his judgment, and is not guilty of any
 fraud or gross abuse of the confidence placed in him. If a
 loss ensue from mistake or error of judgment, where there is
 no *lata culpa* or *crassa negligentia*, his principal and not he
 must bear it. And if liable, he is excused if the principal
 adopt his acts, Fowle & al. v. Stevenson; 1 Cain. 539, Cod-
 wise v. Hacker; 2 Cain. Er. 36, 49, 63.

§ 14. Several distinct merchants residing abroad employ
 a factor, and empower him to remit by merchandise or good
 bills of exchange, as he might judge best. He remitted by a
 general bill payable to one of them, with separate drafts on
 him in favour of each of the others. Held, a good remittance;
 but material, notice be given of each one's proportion to the
 parties, nor is the factor liable if the drawer was in good credit
 when he drew, though he fail afterwards.

3 Cranch
 415, Manilla
 v. Barry.

§ 15. *A factor acting according to his instructions or not.*
 Error to the Circuit Court in Maryland. The plts., Spanish
 merchants, Jan. 27, 1798, sent instructions by Menendy, the
 principal agent, to the deft. to purchase for them 20,000 quin-
 tals of tobacco, and to ship it as soon as convenient in six or
 more vessels, on his, the deft's., account and risk, and as his
 own, (intention to cover it from capture) advised to consult
 said Menendy; and added, "you will take care to seek cap-
 tains of fidelity, American born, and that all the crews be
 strictly agreeable to law." The deft. purchased the tobacco
 at \$10 50 a quintal, but could not procure American vessels
 for all. Shipped one cargo in a Moorish, and one in a Danish
 vessel. And after war was immediately expected between
 France and the United States, shipped one by Menendy's
 advice to a neutral Genoese merchant, and on his account and
 risk. These three cargoes were captured, and plts. sued to
 throw the loss on the deft. for a departure from orders. Judg-
 ment for him, as his instructions justified what he did. The
 main objects were to protect the property as neutral, and for
 the deft. to be advised by said Menendy, plts'. confidential
 agent.

CHAPTER XXXI.

THE ACTION OF ASSUMPSIT FOR FEES, &c. CASES IN WHICH IT LIES OR NOT, PRINCIPLES OF THE ACTION.

§ 1. It has been decided, that a *quantum meruit* lies for fees. As for serving as a commissioner on a commission to examine witnesses when appointed on the nomination of the deft. The declaration stated that the plt. at the deft's. request served him &c.; see 1 Esp. 8; Ch. 144.

1 Salk. 330,
Stockhold v.
Collington.—
2 Stra. 1262.

§ 2. An officer must execute a precept, and cannot previously demand his fees, but may, after it is executed, though erroneous; for the error is not the officer's fault, and when he had done the business he is justly entitled to a reasonable allowance, and is entitled on execution, though the parties compromise before the goods are sold, and after the seizure. 5 D. & E. 470; 1 Cain. 192.

1 Salk. 330,
331, 332,
Earle v.
Plummer.—
2 Stra. 1262.

§ 3. No court has power to settle the fees of its officers so as to conclude the subject. But on a suit in a *quantum meruit* by an officer for his fees, the judges assessing them in a reasonable manner may be good evidence, but not conclusive to the jury; but after once found reasonable by a jury, then this finding may be conclusive evidence.

12 Mod. 609,
Ballard v. Gerard.

§ 4. There is no fee for christening or burying, unless by custom, and then only to him who does the duty, 12 Mod. 171.

1 Salk. 332,
Burdeaux v.
Lancaster.

§ 5. General principles in England seem to be, that a counsellor or physician cannot maintain an action for his fees. But our practice is different, as several actions for fees which have been supported will shew. This case was assumpsit for a doctor's fee for delivering the deft's. wife in a very difficult case, and judgment for the plt. on argument.

3 Bl. Com.
Ch. Notes 3.
—4 T. R. 317.
Essex, Nov.
S. J. Court,
1789, Swett
v. Hooper.

§ 6. In this case in England it was held, that a physician cannot maintain an action for his fees, for that the reward is merely honorary. Likened to a barrister's case.

4 T. R. 318,
Charley v.
Bolcot, exr.

§ 7. By the laws of the Union and of each State the fees of office are generally regulated and ascertained, so that it is very seldom the reward depends on a *quantum meruit* in regard to officer's fees; but it is otherwise as to physicians and attornies as between them and their clients &c.

If a sheriff arrest A on a ca. ss. while attending court, and he is discharged, the service being void, he is entitled to no fee.
10 Johns. R. 93.

§ 8. Where attornies have a *lien* for their fees; see *Lien and Set-off*, Ch. 168, a. 6; and debt for fees, see *Debt*, Ch. 144; assumpsit lies for attorney's fees on 3 J. 1. 7, s. 1, directing bills to be given.

CH. 31.

6 D. & E. 681,
Boyer v.
Dodsworth.

§ 9. *Assumpsit* for money had and received, to recover back fees received by the deft. to the plt's. use as belfry-sex-ton &c., an office for life. Held, he cannot recover, unless the fees demanded be known and accustomed fees annexed to the office, and such as the legal officer himself can recover in a court of law from persons bound by law to pay such fees. Hence, the remedy extends not to such fees as persons may give or not, as they please, *mere gratuities*. And he that performs the services, officer or not, for which the gratuity is given, is entitled to it on principles of natural justice. The gratuity in this case was received for shewing the church to strangers. The grant permitted the plt. to shew it, but this is no grant of an office. Where an usher recovered his fees, see 2 Stra. 747; Salk. 78; Duppa v. Gerard.

2 Stra. 1027,
Bulstrode v.
Gilburn.

§ 10. If fees be created anew after deputies are appointed, not they, but the principal is entitled to them. And if the plt. have a remedy upon a covenant to account, he cannot bring *assumpsit* for monies had and received, for he has a remedy of a higher nature; and if the deputy's duties are increased, it is only a reason for a new contract.

7 Johns. R.
35, 36,
M'Intyre v.
Trumbull.—
6 Bac. Abr.
156.

§ 11. In levying an execution the deputy took more fees than the law allowed; held, an action lay against the sheriff for this act of his deputy; nor was it necessary to shew that the sheriff recognised the act of his deputy, 3 Wils. 399; 1 D. & E. 148, 159.

2 W. Bl. 1181.
Raines v. Nelson.

§ 12. The sheriff is not held to pay the costs if he acts *bonâ fide*, and requests the court's assistance when he tries the question of the deft's. bankruptcy between his assignees, and the plt. is liable for his deputy's breach of a penal statute, 11 East 25, Sturmy v. Smith.

Lofft 433.—
Lofft 253.
1 Salk. 330.

§ 13. The officer is not entitled to poundage till the goods are sold, nor can he detain for fees, 1 Ld. Raym. 4; nor is the sheriff entitled to fees of poundage if the judgment be irregular; see Earl v. Plummer, and Peacock v. Harris; nor can a deputy sheriff refuse to execute process till his fees are paid.

2 D. & E.
148, 159,
Woodgate v.
Knatchbull.—
Dougl. 40.

§ 14. If it appear by the sheriff's return of an execution more fees have been taken for the levy than allowed by statute, 29 El. c. 4, the sheriff is liable to an action on that statute for treble damages at the suit of the party grieved; see 2 W. Bl. 832.

6 Johns. R.
125, Woods
v. Gibson.

§ 15. The sheriff summoned a jury for the Circuit Court, but was out of office before the return of the *venire*. Held, he was entitled to fees for summoning the jury, but not for the return of the *venire*.

5 Johns. R.
252, Adams v.
Hopkins.

§ 16. The attorney is liable for the sheriff's poundage on a *ca. sa.* on serving the execution, and without resorting to the

party ;—may be a good rule, if the attorney employ the sheriff, but quære, if the party himself employ him.

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§ 17. *Honorary fees.* The origin of them, so far as our accounts extend, was among the ancient Romans, in some cases derived by them from the Greeks. Among the Romans they originated in patronage, in the intimate and peculiar connexion there was between patron and client, where in a popular government so much depended on eloquence and good pleading. Each patron had his clients, whom he defended, and whose causes he plead on every occasion, and as in the nature of things there could be no uniform fees or reward regulated by law or otherwise, the recompense the client made to his patron was a matter of honour, regulated not by law, but by the feelings and confidence, the ties of friendship and liberal sentiments, which naturally existed between persons defended and their defenders. This connexion between patron and client was also political, and gave the great men in Rome, especially the able orators and pleaders, an influence and standing among the common people, of which now we can have no just conceptions. Some of the clients were immensely rich, and ardently sought to obtain or to preserve the good opinion of their fellow-citizens in a popular government, and their success very much depended on the exertions of their patrons. Riches, especially in the provinces, were acquired in a manner that often caused their possessors to be vigorously attacked and impeached, and not unfrequently put on their trials to defend them and their characters, and sometimes even their lives, where every thing depended on the most powerful eloquence and pleadings. Hence, the enormous honorary fees given; such as authorized Cicero to boast, that he received more than a million of dollars, our money, from his clients in presents and legacies as honorary returns for his pleadings for them, and so as to Lucullus Atticus and others. Middleton's *Life of Cicero*, 2 vol. p. 514.

§ 18. The Roman laws at times interposed in regard to lawyers and their fees. For a long time, and as late as the time of Cicero, only one was allowed to argue on each side. This circumstance led to immense honorary fees, or presents, or legacies, in order to retain or secure the very first pleaders in great causes. For a long time the *patroni* (*defensores*) received no fees as such in particular causes, but all in presents and legacies.

§ 19. In Pliny the younger's time, two pleaders were allowed on each side in cases of impeachments, and they received fees in his time. And the younger attorneys were employed by the eminent counsel in their causes in the usual order of the business of the bar. But some emperors after Pliny's

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Dig. 50, 13,
 2, 12.—Cod.
 2, 6, 7.—Cod.
 1, 16, 7.—
 Dig. 3, 1, 4.

time strictly forbid fees to be taken. This prohibition led of course to presents and legacies from clients to counsel, especially where life, character, or great interests were in danger. Justinian limited the *præmium honorarium*, not to exceed a hundred aurei for each cause; but if nothing was promised or paid, a reasonable compensation was recoverable. The office of counsel being viewed as public, a counsellor was compellable to undertake and act in a party's cause.

§ 20. At the Roman bar and in conducting causes, there were several grades of persons naturally employed. The counsel were *patroni* or *defensores* as already mentioned. They were the orators who argued the causes: 2. *Advocati*, that is, assistant counsel: 3. *Procuratores*, proctors who acted for clients that were absent, and managed their business for them under special powers: 4. There were attorneys or agents, *gestores negotiorum*, appointed generally: 5. Also clients had on the spot their *cognitores* to help them manage their affairs. It is not to be understood the inferior or even middle grades thus employed in conducting suits, prosecutions, and impeachments, received only honorary compensation. Far otherwise, as in modern times, they received the *quid pro quo* or reasonable reward, as ascertained by law or by custom, and only eminent orators and pleaders generally depended on the honorary rewards as presents and legacies, and it is doubtful if even these did, in common and ordinary business on which the law or usage could conveniently set a price. In Rome, as in other free and rich countries, there was one common reason (among others) for honorary fees or compensation. No law or custom could fix a uniform standard of compensation, so extremely various were the circumstances of great causes and of counsel and clients concerned in them. Thus honorary fees in certain cases very naturally grew out of litigation and the connexions above stated. This natural distinction between honorary and other fees has been, in substance, continued down in Europe to the present time, and in a considerable degree in this country, with an exception as to legacies and political considerations. In Chorley v. Bolcot the pl't's. counsel viewed the Roman practice as the foundation of the English.

Cro. El. 59,
 Marsh v.
 Kavenford.

§ 21. In this case of assumpsit three judges said that it was adjudged in the exchequer, that a promise of £10 in consideration of counsel given to one, was good, though the counsel had been given before. But in 2 Leon 111, it is said, fees to counsel are now considered as *quiddam honorarium*; a present, not a payment; not recoverable by law, and if paid, not recoverable back. The ancient Roman orators had their clients, and practised *gratis*, for honour merely; at most, to gain

3 Bl. Com.

influence, "and so likewise it is established with us," (cites Davis, Pref. 22, and 1 Ch. R. 38,) "that a counsel can maintain no action for his fees; which are given not as *locatio vel conductio*, but as *quiddam honorarium*; not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation," cites Davis 23; and by a decree of the Roman Senate, advocates were allowed their *honorarium*, never to exceed 10,000 sesterces, about \$355; this decree was passed in consequence of extravagant fees demanded. Tacitus says Samius had retained Suillius, with a fee of ten thousand crowns; and other very extravagant fees were complained of. See the arguments in the senate, for and against, 2 Mur. Tacit. p. 9, 10, 11; by these it appears that some few rich orators employed their eloquence for honour and influence only, among the Romans.

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A. D. 47,
Tacitus' An-
nals, Lib. 11,
s. 1, &c.

§ 22. Assumpsit by an attorney for fees and disbursements in defending suits in an inferior court, also, in B. R. and he recovered. Deft. pleaded 3 J. 1, ch. 7, directing attorneys to give bills to their clients one month before they sue them. Held, this act did not extend to inferior courts, nor to any, when a special promise is laid, or there is an *insimul computant*. As neither appears in this case, the attorney must have recovered on an implied promise, at common law. So is every day's practice in this state. So Grigg recovered on the same principle, and the court refused to refer an attorney's bill for business done in one court, to a master in another. The 2 Geo. II. c. 24, as to giving bills, does not extend to conveyancing, but he recovers as above. Bull. N. P. 145.

1 Salk. 86,
Berkenhead
v. Fanshawe.Salk. 89,
Grigg's case,
and Salk. 696.

Fees are considered certain perquisites allowed to officers in the administration of justice, as a recompense for their services, ascertained by statute or by ancient usage: paid by the king anciently. This rule held only to his officers in the administration of justice.

2 Bac. Abr.
Fees &c. A.
Cites Co. L.
368.—2 Inst.
176, 208, 209.

§ 23. All fees allowed by statute become established fees, and officers may have proper actions for them. So are all that have been allowed by courts of justice to their officers, as a recompense for their labour and attendance. See Debt, ch. 144, s. 15.

2 Bac. Abr.
Fees A.—21
H. VII. 17.—
Co. L. 368.

§ 24. It clearly is extortion for any officer to take more for his fees than the law allows; or before his fee is due, that is, before the service is done by him; and for extortion he may be indicted. The officer must perform the service directed to be done by his precept, and then claim his fee.

10 Co. 102. a.
—2 Bac. Abr.
Fees.

§ 25. *Pilot's contract for extra fees, how void.* In New-York a branch pilot contracted to assist a vessel in distress, for a certain extraordinary compensation. Held void, as the statute of the state made it his duty to assist in such cases for

1 Caines' R.
104, Calla-
ghan v. Hal-
let.

CH. 31. his legal fees: further the court thought that such contracts might lead to oppressions. This case establishes a principle for many cases.

2 Johns. R.
193.—See ch.
49, s. 32.

§ 26. *Promise by an officer against law, is void*; as where a constable, having an execution against the deft. issued from a justice's court, promised him, if he would deliver property as security, not to sell it under thirty days; this promise was contrary to the duty of the officer, so against law and void.

2 Day's Ca.
628, DeFor-
est v. Brain-
erd.

§ 27. A contract between a sheriff and his deputy to allow yearly a stated sum to the sheriff, in consideration of the appointment, is legal and operative.

1 Caines' R.
13, Gilbert v.
Frazier.

§ 28. Fees on levying a fine cannot be collected of the party; but must be charged by the sheriff in his account.

Id. 102, Hil-
dreth v. El-
lice.

§ 29. If he levy on property he is entitled to his poundage on the full sum endorsed, if so much in value be levied on, though he do not sell, by reason of an amicable settlement made by the parties.

1 Caines' R.
195, per Liv-
ingston J.

§ 30. But he loses his fees on a writ against the *person*, if countermanded before served, though the officer may have been several times to the deft's. house to arrest him.

9 Johns. R.
114, 115,
Ousterhout v.
Day.

§ 31. How the officer for his fees may look to the attorney in the action. This he may do, though he may also look to the client in the first instance, and if he elect to sue the attorney without a demand on the client, especially after five years elapsed, and no such demand made, there is a waiver of his right to call on the client.

9 Johns. R.
328.

§ 32. The sheriff has his reasonable fees and expenses for bringing up a former sheriff, on an attachment in not returning process.

CHAPTER XXXII.

ASSUMPSIT, FRAUDS, THIS ACTION HOW AFFECTED BY FRAUD.

See Deceits,
and Agree-
ments, Ch. 9,
a. 20, &c.
Statutes &c.
as to frauds;
ancient ones
as to 2 H. III.

ART. 1. *General principles.* This action of assumpsit can never be defeated by *fraud in defence*.

§ 1. This subject has been considered already in some measure, and is here introduced in order to notice a few general principles, material in this, as in many other actions; as the plt's. action may often be founded on a contract tainted with fraud, or said to be so. It is material to see how fraud

affects contracts, and how far actions may fail or not, by reason of it. 4 H. VII. ch. 17; 6 E. I. ch. 11, against fraudulent recoveries. 21 H. VIII. ch. 15, same. 13 E. I. ch. 4, to preserve dower. 9 R. II. ch. 3; 5 E. III. ch. 6 &c.

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§ 2. It is a general principle that "*fraud or covin in judgment of law, may avoid every kind of act.*" And "what circumstances and facts amount to such fraud or covin, is always a question of law; and courts of equity and of law have a concurrent jurisdiction to suppress, or relieve against fraud;" and there must be the same construction in law and equity.

Ld. Mansfield.
1 Burr. 396.—
2 Mor. Ess.
63, Bright,
exr. v. Eynon.
—Lofft. 331,
427.

§ 3. And a judgment, award, or decree, obtained by fraud shall be set aside as null and void, except as to the parties to it. Chipman's R. 63.

Bac. Abr.
196, 201.—
1 Lofft. 427,
476.

§ 4. Fraud invalidates as much in a court of *law*, as in a court of *equity*: "whether a transaction be fair or fraudulent, is often a question of law;" "it is a judgment of law on the facts and intents."

3 Co. 77.—
1 Vern. 443.

§ 5. The fraud of the agent is the fraud of the principal, and equally avoids the act, fraudulently done.

4 T. R. 39,
Doe v. Martin.

§ 6. The statute of 13th. of El. relates to creditors, and the 27th, to purchasers, which see at large in a subsequent chapter. These statutes have been adopted here, as they respect the avoiding of contracts; and even if not, the law is as laid down by Lord Mansfield, in the great case of *Cadogan v. Kennet*, to wit: "the principles and rules of the *common law*, as now universally known and understood, are so strong against *fraud* in every shape, that the *common law* would have attained every end proposed by" these statutes, that will defeat every deceitful practice in defrauding another of his rights.

Statutes 13 of
El. and 27 of
El.—Clavey v.
Hayley.—
Cowp. 427,
434, Cadogan
v. Kennett.—
Hawk. P. C.
ch. 71.—2
Bin. 154.—
2 Johns. R.
404.

§ 7. *Cases.* An *insolvent* person assigned over his effects for his creditors, and the plts. signed under a *secret agreement* that they should have their whole debt. The court held that this agreement was fraudulent, and that no action lay upon it. It was a coercion on the debt. and a fraud on the other creditors; but otherwise, if only a share had been agreed for. A sale of goods by covin, even in market overt, is void. Cro. El. 86. 2 Inst. 713.

4 T. R. 166,
Jackson v.
Lomas.—
6 T. R. 146,
Fiese v. Randall.

§ 8. *Assumpsit* on a note for £15. The plt. wished to get £100 for his goods; this sum the debts. could not advance, but they contrived to sell them apparently to one Welsh, for £70, to get him to advance the money for the debt., the real buyer; and the debt. privately gave this and another £15 note to the plt. for the goods. This *private* agreement was unknown to Welsh, and was a fraud upon him, to induce him to advance his money; and as the plt. was a party to the fraud, it was held that he could not recover.

3 T. R. 551,
Jackson v.
Duchain.
4 East 372,
Leicester v.
Rose.
6 Ves. 300, 3
do. 466.—
1 Anstr. 202.
—1 Atk. 106
—1 H. Bl.
647.

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1 W. Bl. 363,
Montefiore v.
Montefiore.

§ 9. In this case it was decided, that if on proposals of marriage between two persons, a note is given by a third person to one of them, without any consideration, to make the man appear rich, and to promote the match, but with no intention it shall be paid, is fraudulent as to the party deceived; yet it is valid against the giver; "for no man shall set up his own iniquity as a defence, any more than as a cause of action. And an action may be maintained against him on such a note; and when arbitrators ordered such a note to be given up, the court held that they were mistaken in point of law, and directed their award to be set aside.

12 Mod. 558.

§ 10. So if one who is *solvent*, under a pretence of *insolvency* get a debt abated, it is a fraud in equity.

Fraud is a
question of
law, especial-
ly if no dispute
as to the
facts.

9 Johns. R.
337.—

1 Wils. 260,
Royal v.
Rolle, and 3
Burr. 331,
cited New.
on Con. 376.

§ 11. So if one take a *mortgage of goods*, debts, &c. and *does not take possession*, it is *fraudulent*, and he cannot recover. But there are some exceptions to this rule, which see, post. As where one Harvest and Stevens were partners in a brew-house, and in the utensils, goods, and debts. Harvest for a valuable consideration mortgaged his half of all to Potter; but Harvest and Stevens continued in possession, and carried on the business as before; Harvest appearing to be the owner, and acting in all respects as owner, and as he used to do before he made the mortgage—he became a bankrupt. Held that Potter had no title against the assignees, to Harvest's half of the personal estate; for a "mortgagee of *goods moveable*, and *choses in action*, is the true owner thereof," and the same ought to be delivered to him, as much as may be, "by delivering the goods themselves specifically, or the key of the ware-house wherein they are, with the possession thereof, and by delivering the muniments, books, and writings, relative to the choses in action, and enabling the mortgagee to reduce the same into possession by action or suit." As Potter did not do this, but suffered Harvest to remain in possession as above, it was giving the mortgagor a false credit, and so, fraudulent against creditors, in respect to the moveable goods, and choses in action.

6 T. R. 263,
Cooling v.
Noyes.

§ 12. If a creditor agree with a debtor to take 5s. in the pound, on his assurance that his other creditors will do the same, and they will not do it, and this assurance being false, no action lies on the agreement; nor is it any bar to the former right of action. Any gross misrepresentation of facts makes the contract void. 4 Dallas, 250.

8 Co. 262,
Turner's case.
—2 Hen. &
Mun. 189.—1
Binn. 602.

§ 13. In this case A recovered a just judgment against an *administrator*, for £100, and would have released for £60; the administrator preferred to delay this release, to plead the judgment for £100 against creditors. Adjudged to be as to them a fraud and deceit. The administrator ought not to save

the £40, to his own use. He is a mere trustee for the creditors, and ought to settle the estate faithfully, for their benefit. **CH. 32. Art. 1.**

The usual marks of fraud are, First, where the gift of one's goods is general. 3 Co. 80, case of Twyne.

Second. If the donor or grantor *continue to possess* and use the goods. 2 T.R. 596.

Third. If the deed, or bill of sale, be made in *secret*. 3 Co. 81,

Fourth. If the deed be made on any implied trust or confidence in favour of the donor or grantor. Twyne's Case. Hob. 1. —Law Gram. 115.

Fifth. If the deed, or sale, or gift, be made while an action is pending. Therefore, if a man's goods be had in satisfaction of a debt, it is best to have the thing done in a *public* manner, before witnesses of credit, and the goods fairly appraised at their just value. 2 Bos. & P. 59.—6 Co. 72.—2 Esp. 290.—1 Esp. Cases 205.—1 Camp. R. 333.

§ 14. Though a grant of lands or goods be to deceive creditors, and so is void as to them; yet it is good against the grantor and his representatives. So an act in court may be void for fraud. 2 Bl. Com. 441; Law Gram. 115; 3 Co. 77, Farmer's case; 2 Cro. 271.

§ 15. If one have a term, &c. and make a *voluntary disposition of it, privately*, and then offer it to me in mortgage for a debt justly due to me, and I, having a hint about that disposition, ask him concerning it, and *he denies it*, this is a fraud; and his disposition is void within the 27th of El. ch. 4, and I hold the term. A mortgage is a purchase within that statute. This mortgage was three years after the settlement, 4 Cruise 379. Cowp. 278, Chapman v. Emery & ux. —4 Cruise 379, Evelyn v. Templar.—4 Cruise 390.

§ 16. In this case of *assumpsit* for goods sold and delivered it was decided, that if a creditor take an absolute bill of sale of the debtor's goods, but agrees to leave them in his possession for fourteen days; in that time the debtor dies, whereupon the creditor takes and sells the goods. Held, he is executor *de son tort*; for the debtor's continuing in possession is inconsistent with the deed, and fraudulent against creditors; that it is a general rule in the transfer of chattels, that the possession must accompany and follow the deed. Hence, if the conveyance be absolute, the possession must be delivered immediately; if conditional, it will not be rendered void by the vendor's continuing in possession till the condition be performed. The delivery of a cork-screw in the name of the whole had no effect. If I buy a debtor's goods at the sheriff's sales, I may leave the debtor in possession and yet have title, as where one Aburn's goods were taken in execution and put up to sale, and the plt., his brother-in-law, bought them and took a bill of the sheriff, but permitted A to remain in possession; held, the plt.'s title was good against Aburn's other creditors; here was no view to defeat creditors. 2 T. R. 287, Edwards v. Harben, exr. —4 Binn. 258. 2 Bos. & P. 590, post.

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2 T. R. 594,
is cited Bam-
ford v. Baron.

§ 17. The court held, that if one assign his goods to trustees for some of his creditors, and he is to remain in possession one year, and account to the trustees for the profits of his business, this is fraudulent. But if my tenant sell me cattle absolutely, and I leave them with him to pasture for me at the usual price, the sale is good as to his creditors, 15 Mass. R. 244.

Dougl. 88,
Devon v.
Watts.—
1 Wood's
Con. 417, 418.
—Co. L. 35.—
3 Co. 80.—
2 T. R. 687.

§ 18. So contracts may be void for fraud, though there be a valuable consideration, and even possession given.

Mass. S. J.
Court, Nov.
Term 1799,
Swinerton
jr. v. Swiner-
ton.—2 Bl.
Com. Chr.
Notes 39.

As where one purchases and pays a valuable consideration, he has no title or right of action thereby, if at the time he knew there was a decree for the thing in favour of another, or that another had a deed of it, though not recorded.

§ 19. In all these cases the buyer must be a party in the fraudulent intentions to cheat or deceive others; for however fraudulently disposed the seller or debtor may be, if the buyer or creditor is innocent and honest in the affair, his title is good, (except in certain cases of bankruptcy) but if the buyer have reason to think the seller in debt, this may be evidence of such intentions.

The same
case also.
Mass. S. J.
Court, Nov.
1796, Adams
v. Adams, and
post.

§ 20. So no creditor can object to a conveyance as fraudulent, unless he be a creditor when it is made, for if then not a creditor he is not affected by it, and it is then good as to him, and cannot be made void by a subsequent fact; but see a. 2.

§ 21. A fraudulent sale of A's goods makes the vendee executor of his own wrong of A after his death, 2 Saund. 137. And if A sell and deliver goods to B, insolvent, on his false and fraudulent representation, that he is in good circumstances and take his note, the sale is void, and A may replevy them from the officer who has attached them for B's creditors; though one fairly purchasing them of B might hold them, 15 Mass. R. 156, 159.

Cowp. 434,
435, Cadogan
v. Kennett.

§ 22. In this case Lord Mansfield stated the law, and said, that acts against fraud ought to have a very liberal construction in order to suppress it; that by the 13th of El. "no act whatever done to defraud a creditor or creditors shall be of any effect against such creditor or creditors." (The 27th of El. is the same as to purchasers.) That this act must be so construed as not to "make third persons sufferers," this act is not against any *bonâ fide* transaction, "and where there is no imagination of fraud," "and so is the common law;" but if not *bonâ fide* "a valuable consideration will not alone take it out of the statute." And so if the possession of the goods be actually changed, yet if done to defeat creditors, the transaction is fraudulent and void. But the purpose must be fraudulent or iniquitous; it must be to assist one man to cheat another. "The statute says not a word about possession."

But the law says, if after a sale of goods the vendor continues in possession, and appear as the visible owner, it is evidence of fraud," "because goods pass by delivery." "But it is not so in the case of a lease, for that does not pass by delivery; see 2 Bos. & P. 59, 60, and many cases cited.

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§ 23. "The statute of 27th of El. ch. 4, does not go to voluntary conveyances merely as being voluntary, but to such as are fraudulent." "The question in every case is, whether the act done is a *bonâ fide* transaction, or whether it is a trick and contrivance to defeat creditors." Possession in the vendor does not prove fraud when a part of a fair trust or contract, as where one fairly secures the furniture of his house in trust, and remains in possession of that and his house in pursuance of the deeds.

This statute is adopted in N. York.—
10 Johns. R. 185, &c.

§ 24. If I contract to sell lands to A, I am deemed in equity a trustee for him till the conveyance is executed. And if I afterwards sell them to B, he having notice of the preceding agreement, his purchase is fraudulent, and A may bring his bill against B for a specific performance; but there is a question if there be any remedy at law.

10 Mod. 518,
Atcherley v. Vernon.

§ 25. In this case it was decided, that a voluntary settlement is not void against a subsequent purchaser within the 27th of El., if it be not covinous and fraudulent; and that he to be within the act must be a fair purchaser, *bonâ fide*, and for good consideration, as marriage or money &c. More at large, Ch. 109, a. 9.

Cowp. 705,
Doe v. Routledge, and post.
See Sugden 461, 480.

§ 26. A judgment confessed for too large a sum, and so apparently void, may be explained by evidence, to be by mistake, and so valid. What is not a purchase within 27 El., Co. L. 3, Hatton v. Jones.

5 T. R. 8,
Pease v. Naylor.

§ 27. There is a distinction between fraud and legal diligence. Therefore, if the debt. owe a debt to the plt., and another debt to A, and the plt. get judgment against the debtor, and he then goes to A, his other creditor, and confesses judgment to him, on which he gets execution and levies it on the day the first plt. would have been entitled to execution, and had threatened the debtor to sue it out, this preference the debtor gives A, or this step he takes, is not fraudulent within the 13th of El.

5 T. R. 235,
Holbert v. Anderson.

§ 28. So a purchase for a full price is fraudulent if it be made to wrong a third person; as if A get judgment against B for a just debt, and C knowing this buys B's goods for a full price to defeat the effect of A's judgment, this is fraudulent.

Watson on Partnership 146, 147.

§ 29. "Again, if a man knowing that an executor is wasting and turning the testator's estate into money, the more easily

1 Burr. 474,
Worseley v. De Mattos—
Dougl. 92.

CH. 32. to run away with it, buy from the executor with that view, though for a full price, it is fraudulent.

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§ 30. But a creditor may attach, get a mortgage, a bill of sale of goods, &c. from his debtor, and thereby secure his whole debt. This he may do even under the bankrupt system, but the debtor under that system can never give a voluntary preference. Hence,

1 W. Bl. 362,
Compton v.
Bodford.

§ 31. Lord Mansfield said, a trader before an act of bankruptcy committed may pay a fair honest creditor in money or goods, or give him security.

1 W. Bl. 441,
442, Hooper
v. Smith.

§ 32. But if the bankrupt assign all his stock in trade, it is void, for the deed of assignment makes him a bankrupt; he not having any thing to trade on. The deed itself is an act of bankruptcy. A fraudulent exception of a part does not alter the case; but a trader may lawfully assign part of his stock in trade in favour of a particular creditor, the same day on which he afterwards commits an act of bankruptcy. As where a bankrupt assigned silks, about half his stock in trade, to his mother to secure a just debt, on the morning of the day on which he afterwards committed an act of bankruptcy.

1 W. Bl. 660,
Alderson v.
Temple.
Same case, 4
Burr. 2235.
—Cowp. 117,
Harmon v.
Fisher.—See
3 Wils. 47,
Linto v. Bart-
lett.

§ 33. And in this case Lord Mansfield said, a man may, or may not at the eve of a bankruptcy give a preference to a particular creditor; if one demands first, or sues or threatens him, and he prefers without fraud, the preference is good, but when it is clearly to defeat the law, it is bad. A bankrupt cannot of his own head make a preference. Therefore, if he prefer one creditor, in sending him a bill by post without his knowledge, this is fraudulent and void when done on the eve of bankruptcy. And in this case no course of dealing between the parties appeared in sending this note. See Bankruptcy, Ch. 18.

5 T. R. 420,
Estwick v.
Caillaud.—
See a. 4, s. 22.

§ 34. In this case the court held, that where one having several creditors, conveyed a part of his real and personal estate to a trustee, in trust out of the profits to pay half to the grantor and half to certain creditors named, not meaning any fraud or delay to other creditors, the conveyance was valid. And in this case Buller J. said, that "fraud is sometimes a question of law, sometimes a question of fact, and sometimes a mixed question of law and fact." In this case it was proved, that Lord Abingdon, the grantor, had no intention to defraud or delay Townsend, a creditor, who questioned the validity of the deed, and no other creditors appeared not provided for in the deed; and his remaining in possession of a house &c. was no objection, as it was satisfactorily explained. So, valid, though to the intent to delay a creditor of his execution, 3 Maule & Sel. R. 371, 377, possession was delivered.

§ 35. The statute of frauds and perjuries, 29 Ch. II. c. 2,

has provided for sundry contracts being in writing, and has also introduced a distinction between written and unwritten contracts, already considered in chapter 11, a. 2, as to agreements &c. As the act was passed for the suppression of frauds, as well as perjuries, it ought to be liberally construed to effect those purposes.

ART 2. *Voluntary and fraudulent conveyances and settlements, how affected by a further sale.* § 1. In this action the plt. claimed the estate as assets of his intestate for his creditors. The deft. claimed it as a fair purchaser. The case was, the intestate, Robert Hooper, A. D. 1787, when insolvent, conveyed the land in question to his son Greenfield Hooper, by deed executed, acknowledged, and recorded. A valuable consideration was expressed in it, but it was proved there was no consideration in fact; but that it was a voluntary settlement and fraudulent as against creditors. The son, the grantee, entered and was seized and possessed for about five years, and then sold it *bonâ fide* to the deft. for a valuable consideration; these facts were found by a special verdict. The judgment was, that this after sale was good, as it was made to an innocent and fair purchaser.

§ 2. In this case Chief Justice Parsons held, second *bonâ fide* sale good, and the case of the second innocent purchaser is better than that of the first innocent buyer. Swasey sold the land to Farley, his son-in-law, when insolvent, and this sale was questionable; Farley sold to the deft. *bonâ fide*. The plt. levied on the land as Swasey's. Judgment for the deft. This second sale to him being fair and honest, was valid even if the first was not. A, buying without notice, is not affected by the fraudulent purchase of his seller, and if B sell to one knowing the fraud, yet his title is good.

§ 3. So if one make a covinous settlement on his son, who sells for a valuable consideration, and afterwards the father sells to another for money, the son's sale is valid. And the principle as to personal estate is the same as it is as to the real.

§ 4. The plt's. testator owned an annuity ticket and lost it, and the deft. came by it *bonâ fide* for a valuable consideration, and judgment for him, for he was an honest purchaser and had no reason to suspect it was the property of the testator.

§ 5. So a gaming bill accepted and endorsed to an innocent endorsee, is good against the endorser; otherwise if sued by a party to the wrong. A. D. 1696. Strange 1155; 9 Mass. R. 1. So if the maker's name be forged.

§ 6. In this action of *assumpsit* by several partners, the deft. was allowed to plead in bar the bankruptcy of one of them.

Case.—Woodeis Case in *Colville v. Parker*.—Cro. Jam. 158, *Jason v. Jarvis*.—1

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Art. 2.

1 Dallas 427.

Mass. S. J. Court, Nov. 1793, Essex, Goodale admr. of Hooper v. Nichols. See 2 Rol. Abr 393. See Parker v. Partrick. Bailments.—Stevenson v. Hayward, Pre. Ch. 310. —Doe v. Martin, 4 Bos. & P. 332.

Mass. S. J. Court, April Term, 1808, Sutton v. Lord, Ch. 225, a. 9, s. 12. See a. 13, s. 12.—10 Johns. R. 185.—1 Johns. Ch. R. 213, 219.—8 Johns. R. 137.

3 Com. D. 264. Covin B. 4.—4 Wheat. 487. See 1 Sid. 134.—2 Bac. Abr. 607.

9 Mod. 44, 48, case of Herring.—1 Lev. 237.

Salk. 344.—12 Mod. 97, Hussey v. Jacob.—6 Cranch 224, 133.

8 T. R. 140, 141, &c.—Wilson's Vern. 286.

CH. 32.

Art. 3.



And further held, that if partners by deed assign all their partnership effects &c. to trustees for the benefit of their creditors, and some of the separate creditors of one partner do not assent to it, the assignment is fraudulent and void, not only as against those creditors who did not concur, but was an act of bankruptcy; and that it was immaterial whether the creditors who did not concur were joint or separate; and a creditor of one partner has a demand on their partnership effects after the partnership creditors are satisfied.

9 Mod. 35,
38, in Chan-
cery, *Savage*
v. Foster.—
2 Johns. R.
678.—9 East
69, *Doe v.*
Manning &
Hopkins.

§ 7. It has been held in the Court of Chancery, that if A owns an estate, and knows it, and knows that B is buying it of a third person, and A gives no notice of his right to B, A shall never after be permitted to set up his right to avoid B's purchase, for it was an apparent fraud not to give notice of his title; and infancy or coverture is no excuse. And in this case another strong case is cited. See Ch. 62, a. 5, s. 7; 1 Ves. jr. 190.

§ 8. A voluntary conveyance without a valuable consideration, by 27 El. c. 4, is fraudulent against a subsequent purchaser for a valuable consideration, though with notice before all the purchase money was paid or the deed executed. In such case the law presumes fraud "without admitting such presumption to be contradicted. Many cases cited.

2 Esp. 292.—
2 T. R. 587,
Edwards v.
Harben.

ART. 3. *Conditional sales.* § 1. If the seller remain in possession, according to the usual course of business or the nature of the transaction, there is no fraud. As where Lord Montfort on his marriage, conveyed his household goods of his house in town, (among other things) to trustees in strict settlement. His wife's fortune was £10,000, equal to all his debts then, and the goods were added to the settlement, his real estate not being deemed sufficient for the settlement. He remained in possession of these goods. The debt. was a creditor to him when this conveyance was made, and took the goods in execution. The trustees brought trover for them, and the court held, that the 13th of El. was only intended to operate against fraudulent conveyances, and that possession alone was not evidence of fraud. That this being a fair and proper settlement could not be deemed void under that statute. Not done "with a view to defeat creditors." This case has been often recognised, art. 4, s. 7.

2 T. R. 596,
Baller J.

§ 2. So where cows were settled on the marriage of the plr's. wife on certain trusts. Held, not liable for her husband's debts. "When the deed is to take place at a future time, or when a condition is performed, the possession is still in the vendor by the deed, and is consistent with it." "And such possession comes within the rule as attending and following the deed;" also 2 Bos. & P. 59, 60.

§ 3. There is another case of sales not void by the 13 of El., though no possession has been given ; as of ships at sea ; for if a ship be at sea when sold, there can be no actual delivery of her, and there can be no other delivery but that of the grand bill of sale ; and this amounts to a delivery of the ship itself ; for it is the next best act that can be done to give the vendee a title. This was a mortgage of a ship at sea, and Buller J. said, " the grand bill of sale is the only muniment of the property ; by the vendee's taking that, he prevents the vendor from defrauding others." So no false colours were held out to the world. In this case " the plt. took possession of the ship the first moment she arrived in port."

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Art. 3.

2 T. R. 462,
Atkinson v.
Moling.

§ 4. But do not these cases in England proceed on a principle that does not hold in the United States ; the principle is, that the grand bill of sale is " the only muniment of property" in a ship. This is not by the common law, but by 26 Geo. III. ch. 60, sect. 17, which enacts, " that when, and so often as the property in any ship of a British subject shall be transferred to any other British subject in whole or in part, the certificate of the registry of such ship shall be truly recited in the bill, or other instrument of sale, otherwise such bill of sale shall be utterly null and void to all intents and purposes." By this act property in a British ship can pass from one British subject to another in no manner whatever, but by a bill of sale with her registry truly recited therein. 4 Cranch 48, 59, *United States v. Willing & Francis*. Held, if an American registered ship be sold while at sea to a citizen of the United States, there need be no bill of sale or new register till she returns to some port in them, and there is no fraud &c., see Ch. 224, a. 12, s. 23.

3 T. R. 406,
Rolleston &
al. v. Hibbert
& al.

§ 5. But this is not the law of the United States as in the following case.

§ 6. This was an action of replevin brought by the plts. against Turil, a deputy sheriff ; and the court held, our ships may be conveyed at common law, as it respects property. The case was, Turil attached the brig Lark as the property of Thorndike & Farrar, at the suit of General Fish ; the plts., Brown & Thorndike, replevied her as their property. Turil pleaded that she was the property of Thorndike & Farrar. The plts. replied, that she was their property—and issue. A special verdict found that the plts. gave a bill of sale of her to Thorndike & Farrar ; but that the registry was not inserted in it. The question was, if this bill of sale conveyed the property to them, and the court decided that it did, as being good at common law, and that it was not made void by the act of

Mass. S. Jud.
Court, Essex,
June Term,
1795, *Brown
& Thorndike
v. Turil*.
See Ch. 101,
a. 5, s. 23.—
See also Ch.
47, a. 6. Sev-
eral cases.—
7 Johns. R.
308.

The ship's re-
gister is not
evidence of
itself of prop-
erty.—

14 Johns. R. 201, *Sharp v. U. S. Ins. Co.*—4 Tann. 652.—8 East 10.—14 East 169, and cases therein cited.

East 226. —

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Same principles,
7 Johns.
R. 308.

4 East 130.

2 Burr. 941.

1 Wils. 229.

1 Mass. R.
165, Alexander
v. Gould.

3 Mass. R.
487, Liver-
more, as-
signee of
Bartlett v.
Bagley.

4 Mass. R.
502, Kimball
v. Cunnings-
ham Jr.

4 Mass. R.
661, Portland
Bank v. Stacy
& Mansfield,
dep. sheriffs.

Congress of Sept. 1, 1789, sect. 11, which enacted, "that whenever any such ship or vessel shall, in whole or in part, be sold or transferred to any person or persons, the certificate of the registry of every such ship or vessel shall be recited at length in the instrument of transfer or sale thereof, and in default thereof such instrument of sale or transfer shall be void, and such ship or vessel shall not be deemed or denominated a ship or vessel, entitled to any of the benefits or advantages of a ship or vessel of the United States." And the court further said, that this last part of the clause made the bill of sale to Thorndike & Farrar void only as to benefits in custom-house, and not as to the transfer of property; and herein is the material difference between our act and that of the 26 Geo., which makes a bill of sale without a registry inserted, void to all purposes.

§ 7. Yet three years before the 26th of Geo. passed, Lord Mansfield said, a mortgage of ships abroad, or of goods on the high seas by a trader, is good, notwithstanding the 21st of James I, ch. 19, sect. 11, though possession has not been actually delivered, "for a bill of sale is all the possession that can be delivered till the ship comes home."

Articles of conveyance may be set aside for evident fraud and imposition, and so for imposition and public inconvenience, as in buying sailor's prize money &c.

ART. 4. *Further American cases as to frauds.* § 1. This was a real action for land; this land the plt. had taken in execution against one Lennel, Oct. 2, 1800, under whose deed the deft. claimed, dated Nov. 3, 1798. Held, that though this deed was void as to creditors, yet it was not to be avoided by a creditor, the consideration of whose debt was illegal. The plt. was nonsuited.

§ 2. In this action the court held, that a colourable sale and transfer of personal property, though void as against the vendor's creditors, does not amount to an act of bankruptcy, unless executed by a fraudulent deed or conveyance; that the concealment of goods to prevent their being taken in execution must be actual, not constructive, and by the bankrupt himself.

§ 3. The court decided in this action, that to enable a party to a sale or exchange to avoid it for the fraud of the other party, the party attempting to avoid it must return all he has received in virtue of it; for by retaining any part he affirms the contract, and he cannot affirm an entire contract in part and avoid it in part.

§ 4. In this case it was decided, that a *boná fide* conveyance by deed of a vessel and cargo abroad at the time, is valid against creditors, if the vendee take possession thereof without delay on the return of the vessel:—that there is no difference

between the grand bill of sale used in England, and the bill of sale used here in conveying vessels. The bill of sale in this case was a mortgage, and the vessel was in Charleston, South Carolina, and returned to Gloucester where the mortgagees took possession. She arrived the 4th, and they took possession the 18th, and this was deemed due diligence. From Gloucester to Portland was over 100 miles.

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§ 5. In this case the court held, that if one have a fraudulent contract and get judgment on it and execution, and sue the sheriff for a false return of the execution, he having paid money of the judgment debtor to another creditor on execution, and having returned the first execution unsatisfied, may in his defence shew such fraud in favour of the other creditor who has indemnified him, for the judgment being fraudulent against the creditors, any one of them on whom it is a fraud may prove it, and if he indemnify the officer, he may shew the fraud for him &c., as the officer's case is then in fact his, as the officer is employed by the creditor.

6 Mass. R.
242, Pierce
v. Jackson.

§ 6. By these laws all fraudulent deeds or conveyances of any lands &c., made "to defeat any man of his due debts or legacies, or from any just title" were made void. And so was the law of Connecticut, so was the province law of 1692.

Mass. Colony
Laws, A. D.
1641.

§ 7. The possession of goods by the vendor after sale is only *prima facie* evidence of fraud. This possession in the vendor throws the burden of proof upon the vendee to prove the sale was a fair one. This is according to the general course of the best authorities; as where the tenant mortgaged his furniture &c. for security for his rent, but remained in possession &c.

5 Johns. R.
258, Barrow
v. Paxton, but
1 Cranch 309.

§ 8. So a *parol* promise to pay for the improvement of land is not within the statute of frauds, for a promise to pay for these improvements is not the ground of claim of any interest in or out of lands, though it is concerning land.

5 Johns. R.
272, Friar v.
Harden-
burgh.

§ 9. In this case the plt. owned $\frac{3}{4}$ of the coasting sloop Lydia, and Edward Allen $\frac{1}{4}$, Burbeck master. April 16, 1810, she being at Manchester, seven miles from Salem, Allen mortgaged his $\frac{1}{4}$ to Putnam, to secure him as to his endorsements of Allen's notes; both lived in Salem. About an hour after this mortgage was made by a bill of sale, Webb & Beadle, *bona fide* creditors of Allen, attached his $\frac{1}{4}$, and the officer, Dutch, remained in possession till replevied by the plt. After a few days she came to Salem, and immediately on her arrival there the plt. took possession on board and notified his sole property. Held, his title was valid, and not fraudulent.

8 Mass. R.
287, Putnam
v. Dutch.

§ 10. *Where the vendor's possession is but presumptive evidence of fraud.* Facts—In 1782, John Waite was indebted on book to his father; they settled, and said John gave his promissory note to him for the balance, about £360; said

Mass. S. Jud.
Court, Nov.
1792, Wm.
Waite v. Hud-
son, dep.
sheriff.

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John apparently was in good circumstances till 1786. In June 1789, he became insolvent, and the father, then old, endorsed his said note to the plt., his other son; he, in June 1789, had the goods appraised by two men, then in the house of R. Homan, father-in-law of said John, and had been put there by him a few days before he gave the plt. a bill of sale of them. The goods conveyed by it appeared to contain the chaise, and all the household furniture of the said John; the amount thereof was endorsed on said note. There was a formal delivery of the goods, but no removal of them, and they remained some months in Homan's house. Feb. 26, 1790, the plt. leased them for a year to said John; and Sept. 1791, they were attached as his property by Hudson, at the suit of Samuel Parkman. William Waite claiming them under said bill of sale, replevied them. Hudson, the officer, pleaded property in said John, denied the plt's. property and avowed for a return, plt. replied his property and issue. Judgment for the plt., and held, 1. As the deft. had possession, he must have a return; unless the plt. proved property in himself: 2. By the statute of James, possession left with the bargainor, if a bankrupt, is absolute evidence of fraud: but 3. By the 13th of Elizabeth, possession left with him is only presumptive evidence of fraud, to be left to the jury: 4. This sale being openly conducted, and for a valuable consideration, had been clear of all doubt as to fraud, if the plt. had taken the goods into his own hands and kept them: 5. Under all the circumstances of the case the question was, if the sale was fraudulent and to the injury of third persons, and it was properly found that it was not: 6. Held also, an insolvent debtor might legally convey his property fairly to pay one creditor in particular.

Mass. S. Jud.
Court, Nov.
Term, 1793,
Rogers v.
Wingate.

§ 11. If A be insolvent and owe debts, and convey his estate to his sons and take their notes for the purchase money, the creditors of A may levy on the estate as his, being creditors at the time of the conveyance, and if one creditor levy on one part, and another on another, they are witnesses for each other to prove the conveyance was fraudulent and to wrong the grantor's creditors.

Mass. S. Jud.
Court, Nov.
Term, 1796,
Adams v.
Adams in re-
view.

§ 12. Material question—what facts make a creditor, who may shew a sale of property void? The plt. proved he was a creditor to A and B; August 10, 1787, when they made the deeds to the deft. the plt. alleged were fraudulent. April 1791, he got judgment against each, on which he levied. The said deeds were proved to be fraudulent in regard to creditors; but it was denied the plt. was a creditor, because he as an administrator on a certain unsettled estate, to which A and B were two of the heirs, owed them on account of the distributive shares in it, as was several years after proved, as much

as his debts against them. Several points were decided : 1. If A make a conveyance to B, in trust for A, it is fraudulent as to creditors then existing : 2. If A make an absolute or mortgage conveyance to B, securing to him his future advances, it is fraudulent and void on the face of it, and being void for part (such advances) is void for the whole : 3. If A make a mortgage conveyance to B to secure to him a debt unliquidated, and no documents referred to, to govern the amount, it is void, as the parties in liquidating the amount might make it what they pleased to the exclusion of creditors. It will be observed, that in proving the plt. was not a creditor, facts were taken into view not known when said conveyances were made. And the distributive shares he was found in the final settlement to owe as administrator to A and B were made to balance his demands (judgments) in his own right against them recovered, and executions thereon levied some years before said shares were finally decreed. See art. 10, s. 9, where for future advances may be good.

§ 13. *Process obtained by fraud is void, and affords no protection.* As where Bradley and A B were prosecuted for violently assaulting Southwick, a constable, in the execution of his office. Severally pleaded not guilty, and found guilty. The constable had a writ against Bradley and was directed to attach his goods in his shop. He entered it and informed B of his business, and laid his hands on some of the goods to attach them. B to gain time, proposed a settlement when the attachment was incomplete, and got a writ against S., the constable, on a note of about \$5 he owed B, and then came with another constable A B, and arrested S. for the debt and turned him out of the shop and handled him very roughly. Held, that the second writ, though for a just debt to arrest Southwick, was a fraud on the first process, and void, and an aggravation instead of a justification, at least as to Bradley.

CH. 32.
Art. 4.

Mass. S. Jud.
Court, Nov.
Term, 1798,
Bradley's
case.

§ 14. *Who is not a purchaser within the 27th. of Elizabeth c. 4.* Not one who knows of a conveyance of property he attempts to impeach, and purchases afterwards. As where a father, in consideration of *natural affection*, conveyed lands to his son ten years old ; the father then having other real estate, sufficient to support himself and family, and not incumbered with debts, and continuing with his son in the occupation. The creditor of the father, who levied on the estate as his, had notice of the said conveyance, before the father became indebted to this creditor. Held, the said conveyance to the son was valid, and not fraudulent, and that this creditor had no right to complain. The creditor contended he was a purchaser within the 27th of Eliz. That act applies here, for in all the states, nearly, the state statutes against frauds, as to

9 Mass. R.
390, Parker
v. Procter &
al.

1 Cranch
310.

CH. 32.
Art. 4.



purchasers, are intended to be co-extensive with the 13th of Eliz. as to *creditors*, and 27th of Eliz. as to purchasers; therefore, in this case, on Virginia law, the Supreme Court of the United States said, "those acts are considered as only declaratory of the principle of the common law, hence, apply to this case."

Jus. Inst. L.
1, t. 6, &c.
See Ch. 226,
a. 5, s. 32.
Who is a
creditor in
Maleficio?

Several cases, as will be seen, hold that purchasers, under the 27th of Eliz. may look back to a state of things, before they became purchasers, or any way concerned in the estate. These acts probably had their origin in the Roman law, by which one, to have a right to complain, must have been a creditor at the debtor's sale, to impeach it, &c.; therefore, where a debtor manumitted his slaves, and was then clearly *solvent*, and then became *insolvent*, his manumission was held to be valid, for it was fair when it was made; and an insolvent's sales were deemed valid as to all but those who at the time of it were his creditors; and as to them, if the debtor's manumission left him clearly *solvent*; but if *insolvent*, then his manumission was in fraud of his creditors, especially if he meant to defraud them.

It will be observed, that our Supreme Judicial Court adopted the same principle, in *Adams v. Adams*: unquestionably the true principle. And though *Adams* 3d claimed as a creditor, he also claimed as a purchaser, that is, under mortgages. And in *Parker v. Proctor*, above, the creditor also claimed as a purchaser, by reason of his levy on his execution—relied on both the 13th and 27th of Eliz. Deft. denied the demandant was a purchaser within the 27th of Eliz., but only a creditor; and not one, at the time of the deed he objected to.

4 Cruise 373,
378.—Cro.
El. 350.—
Cro. J. 156,
Woodie's
Case.
Ch. 125, a. 5,
s. 40.—Ch.
32, a. 1, s. 15.
—4 Cruise
405.

See more of purchases, under the statute 27th El. a. 13.

Conveyances for a good consideration only, are fraudulent and void, within 13 and 27 El., as against creditors and subsequent purchasers; that is, conveyances in favour of a wife, children, or near relations. So any conveyance, founded only on the moral duty which every husband is under to provide for his wife and children, is fraudulent as to such creditors &c. But if one be bound by contract before marriage, to convey, and so conveys after, this is not fraudulent. But voluntary conveyances bind the party.

4 Cruise 382,
388.—3 Co.
35, Upton v.
Bassett.

No one is a purchaser within the 27 El., but one for money or other valuable consideration. 3 Co. 83; 2 Atk. 601, and Twine's case. If one take a lease, paying no rent, he is not a purchaser, &c. See a. 13, s. 12, a. 1, s. 15. A lessee at rack-rent is one; 4 Cruise 384; a. 13, s. 1.

4 Cruise 388,
334, Griffin
v. Stanhope.

Though a settlement be executed after marriage, it is valid, if made in consequence of an agreement entered into before

marriage, or in consideration of an additional portion. So a settlement by a widow on her children may be valid; as where a widow having two children, by articles before a second marriage with A, by his consent settled her estate on them; afterwards she and her second husband mortgaged it to B, who had notice of the settlement. Lord Hardwicke held it valid, and for a *valuable consideration*, and not voluntary and fraudulent, as to after purchasers; and when so as to them, the deed is valid against the grantor. 4 Cruise 405; 3 Hen. & M. 399 to 435; sundry cases as to marriage settlements, Ch. 323, a. 11. s. 40.

Deeds are void if obtained by fraud, or in derogation of the rights of marriage, or for improperly procuring it; as *Gwine v. Heaton*; *Lance v. Norman*; *Carlton v. Dorset*; *Blanchet v. Fletcher*; *Strathmore v. Bowes*; *Martins v. Bennett*, and other cases in equity. A fraudulent or partial assignment of dower is relieved against in equity.

Where vendor's possession is not fraudulent; as if the parties to the sale of goods be not debtor and creditor, and there is no object to defraud creditors, the goods may remain in the vendor's hands, and no fraud. The mere possession of goods by the true owner's consent does not subject them to the reputed owner's debts; but there must be fraudulent or *deceptive purposes in view*, or implied from the circumstances of the case. As if A buy a livery stable, and give B the possession, for carrying on his business; B to pay over to A the net profits, and A to allow B one third thereof; and A buys and delivers a coach to B; this is not liable for his debts—the property of it remains in A. 3 Cranch 74 to 92.

Things separable from the freehold, not within the statute, and intended to be separated. Hence, a contract to sell them need not be in writing; nor one not to exercise a right as to it, as not to use a mill, or not to trade in a certain shop. The statute contemplates a transfer of lands, or of some interests in them.

Promise raised by law, not within the statute of frauds.

§ 16. This was *assumpsit*, in which the plts. stated an indenture of lease for six years, by Andrew Dexter jr., to William Hamilton, of the Exchange Coffee-House, in Boston, with furniture &c., made January 18, 1808. Another indenture between them, May 5, 1809, altering the rent &c. Another, May 6, 1809, between Dexter and George Odiorne, by which Dexter assigned to Odiorne the rents in the lease in trust to pay certain creditors of Dexter, named, on condition to be void when Odiorne had received sufficient sums to pay those debts. Another indenture of four parts, June 23, 1809, between the plts., Dexter, Odiorne, and Hamilton, by which

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4 Cruise 404,
Newstead v.
Searle.—1
Atk. 265.—
See Ch. 46, a.
7, s. 13.—
2 P. W. 674,
Rand v. Cart-
wright.

4 Cruise 406,
408, 409 to
414.

1 Cruise 166,

9 Johns. R.
135, M'Instry
v. Tanner.—
9 Johns. R.
197, Craig v.
Ward.—
Johns. R. 9,
243.

3 Day's Ca.
476, Bost-
wick v.
Leach.

9 Mass. R.
510, Good-
win & al. v.
Gilbert & al.

CH. 32. Dexter, Odiorne, and Hamilton assigned their interest in the premises to the plts., and Dexter made certain covenants with the plts. for their benefit; and by this indenture the plts. covenanted with Odiorne to pay him \$12,500 in one year, and \$12,500 in two years with interest, in trust for said creditors. Plts. then alleged, September 4, 1809, in consideration that they by their deed poll of that date, assigned to the defts. said indenture of June 23, 1809, annexed to the deed, and all the furniture &c., and the residue of the term, and all rights secured to them by this indenture; the defts. promised the plts. to pay Odiorne said two sums of \$12,500 each, and interest in the manner above mentioned, and to do all the plts. were bound to do by force of said indenture &c. *The defts. took possession.* Judgment for the plts. for \$15,109. The court held, first, if A grant lands to B by deed poll, reserving certain duties to be performed by B, for A's benefit, A may have *assumpsit* against A, on his non-performance, as B entered under the deed, and no action lies against him on it: Second, the court said it was objected this was an agreement concerning an interest in lands, and that no memorandum being signed by the party, the case is within the statute of *frauds*; but, said the court, "when the *law raises the promise*, it is not within the statute," and "the same answer may be made to the objection, that it was a promise to pay the debt of another, and not in writing."

10 Mass R.
308, Allen v.
Smith.

§ 16. *Debtor remains in possession, &c.* to some purposes. This was an action for the deft's. taking 40,000 of the plt's. bricks. February 1812, the plt. was hired by Samuel Mixer of Ward, to make bricks in his yard there, to be paid for his labour, and that of another workman the plt. provided, at \$1.50 every thousand he made and burnt the season; Mixer to board them, to find tools, teams, &c. The plt. received a lease of the brick-yard of Mixer, and the plt. and his man worked there till October 1812, and in that time made and burnt two kilns; one, 72,000, Mixer sold and removed; second, estimated at 108,000, remained entire in the yard. October 6, 1812, the plt. and Mixer adjusted accounts and found due to the plt. \$283. Mixer saying he was not able to pay in money, the plt., in some fear of losing his debt, accepted Mixer's proposal to pay in two pair of oxen, estimated at \$120, and bricks to be set off in the remaining kiln. The oxen were delivered to the plt. and taken away. The lease was given up and destroyed, and a new memorandum signed and sealed by Mixer was made, expressing he leased to the plt. or bearer, all the brick-yard in which the bricks were, until his bricks should be sold and removed. Then the parties in the presence of witnesses counted off eight or nine arches

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of fifteen the kiln consisted of, and put marks and stakes accordingly ; and Mixer declared he sold such part to the plt. ; and the plt. and Mixer agreed Mixer might sell all, or any part so set off to the plt., first securing him the amount of the debt, or of any sale he made ; the payment or security to be made to Fitz, the plt's. agent. Plt. delivered to Fitz the new lease ; he took charge accordingly, and the plt. left Ward and returned home to Franklin. Mixer continued in the use and occupation of the yard ; and October 7, bricks were delivered from the kiln, which Mixer offered to take from any part of it, but were taken from the part left to him ; and he daily sold and delivered bricks from the kiln, and also from the part set off to the plt., and this without any security or payment to Fitz, or any leave obtained of him ; but Fitz, as soon as he knew this, forbid Mixer selling any more from that part. From this part Mixer sold certain 5,000 for money, but ordered the money, as the teamster stated, to be paid to Fitz ; but Fitz testified he received the money and paid it over to Mixer, deducting the expense of carting them. Mixer's creditors broke upon him, and the debt. attached the bricks in question, and caused seventeen or eighteen thousand to be removed ; then Fitz notified the officer of the plt's. claim, and forbid him to remove them, &c. Allen, the plt. claimed them. Judgment for the plt. on a verdict for him, and the court said the jury had, in effect, found that the plt. had taken a visible and notorious possession of the brick-yard, and continued it by himself, or agent. It was not necessary for the plt. constantly to keep an agent in the yard to watch his property and keep possession of it. The lease was a *bonâ fide* possession—was delivered at the time. "It is not always necessary that there should be an actual removal of the goods, and a change of the possession from hand to hand." Here, the bricks could not be removed without expense, and it is not usual to remove them till sold. Mixer did not acquire any false credit, nor could his creditors be deceived, as the jury have found the plt's. possession was *visible and notorious*. Mixer's power to sell was merely for the plt., as to his part of the kiln. Upon this case it may be observed, first, this sale to the plt. of the eight or nine arches of bricks, was not *absolute*, as Mixer might have kept them, securing the plt's. debt &c. ; so no absolute change of property : second, though the lease was of the brick-yard, it was not of it exclusively, for Mixer had a rightful possession, first, to sell and remove his own remaining part of the kiln in it ; second, to sell and remove the part marked off to the plt., accounting to him for the sales or otherwise securing his debt ; but third, the vendee of the goods of an insolvent debtor is not obliged actually to remove them,

CH. 32. though in the nature of a pledge; but the possession may be
 Art. 4. in common between them, or apparently and legally in the
 debtor to some purposes, as in this case to sell and deliver
 even the plt's. part of the kiln, on certain conditions agreed on
 by them, or as the pk's. agent: and there is no evidence of
 fraud to avoid the sale or pledging, if the business be trans-
 acted in the usual way, and if the debtor's creditors may
 know the truth of the case by the common and usual inquir-
 ies: fourth, in this case there was no evidence when the plt.
 for his balance of \$283, took the oxen and bricks, he dis-
 charged that balance, otherwise than his taking them for it, op-
 erated a discharge in law.

5 Johns. R.
 272, Frear v.
 Hardenbugh.

§ 17. *The intruder's case on land.* B owned a tract of
 new land, and without his knowledge A entered upon it, clear-
 ed a part, built and made improvements on it. B brought
 ejectment against him, and recovered the land. Afterwards
 B agreed by *parol* with A to sell him the land, as wild land,
 or pay him for the said improvements. Held, the promise to
 sell the land was clearly void by the statute of frauds. 2d.
 The promise to pay for the improvements was not within the
 statute. 3d. The promise to pay for the work and improve-
 ments made, without request, was *nudum pactum*. 4th.
 There is neither a legal or moral obligation on the owner of
 land, to pay for labor done on it by one who has entered with-
 out the owner's consent, or any pretence of right, and has
 held the land against the owner's will.

Also 5 Johns.
 R. 35.

3 Johns. R.
 87, Comstock
 v. Smith.—
 See 1 Saund.
 264.—
 1 Caines' 585.

§ 18. If the plt. sell a farm to the deft., the plt. to recover
 the consideration money in *assumpsit*, must aver he conveyed
 it at the deft's. request; the promise without this, being a part
 consideration. And it is a general rule, if a promise be found-
 ed on a past consideration, the plt. to enforce it, must allege
 the act done as the consideration of the deft's. promise, was
 done at his request, or shew he is under a moral obligation to
 do the act. Held, on a motion in arrest of judgment.

2 Johns. Cas.
 52, Allaine v.
 Onland.

§ 19. A claimed a piece of land that in fact was C's. A
 directed B, his servant, to enter upon it, and promised to save
 him harmless &c. B entered &c. Held, this was a valid
 promise, and an *original* one, so need not be in writing to
 take the case out of the statute of frauds. 2d. That B's act
 in obeying this command was lawful, and a good consideration
 to support this promise of indemnity.

5 Johns. R.
 85, Gillet
 admr. v.
 Maynard.

§ 20. In 1803, the pk's. intestate agreed, by *parol*, with
 the deft. to buy 100 acres of land of him, and paid part,
 cleared part, and made improvements, and died in 1807. The
 plt. tendered the residue of the purchase money, and demand-
 ed a deed. This the deft. refused, but took possession of the
 land. Held, 1st. The plt. in *assumpsit* for money had and

received, was entitled to recover back the part of the purchase money paid, for the contract was rescinded. 2d. But not entitled to recover for his labor on the land, or for his improvements. In this case the contract (void by the statute of frauds) was in part performed by the plt's. intestate, but in no part after rescinded by the def't's. default, and the def't had not performed any part. Hence this rescinding comes within the principles stated, Ch. 122 &c.

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§ 21. Fraud, as before stated, will vitiate every contract, and when void on account of it, the party may waive the fraud and bring *assumpsit*. As on a sale of goods the vendor took a third person's note, payable at a future day, and at his own risk, but there was a *fraudulent* representation made by the vendee as to the note. Held, the contract as to it, was void, and the vendor might sue immediately for the goods sold. The contract as to the particular mode of payment being void by the fraud of the vendee, he immediately became liable for the goods he purchased, on *assumpsit*, in law.

6 Johns. R.
110, 111,
Wilson v.
Force.

James v.
Morgan,
1 Lev. 111.

§ 22. Fraud consists in *intention*, or in an *intention to deceive and defraud*. This intention is a fact that must be averred in a plea of fraud, and proved. And though a fraudulent conveyance of goods by A is void as to his creditors, it is valid as to him, and his executor &c.; the same if A confess judgment fraudulently, to defeat his creditors, and on execution B fraudulently buys A's goods, with the same intent to defeat A's creditors, and if he be dead, C, a creditor of A, may take administration on his estate, and the same goods will be liable for A's debts. As B is party to the fraud, he has not the protection of a fair purchaser, at the officer's sales. But C, as administrator of A, cannot impeach the judgment confessed by him, but may sue B *as executor de son tort*. But the *non-delivery* of the goods to the vendee at the time of the sale, is but *prima facie* evidence of fraud, and may be explained by circumstances. So are the late English authorities. And it is not evidence of fraud if the insolvent remain in possession after assignment of all his property &c., if at the request of the assignees, and for their benefit; and see Barrow v. Paxton, above. And if a debtor assign property to pay certain creditors, and there is a resulting trust to him, this is not conclusive evidence of fraud, but fraud or not, depends on the intention; but as to vendors remaining in possession on a bill of sale, as a notorious badge of fraud, see Master v. Podger, and 2 W. Bl. 701, and 5 Burr. 2631.

5 Cranch 351,
Moss v. Rid-
dle.—See a.
1, s. 34.—
7 Johns. R.
161, 164, Os-
borne v. Moss.
—5 Johns.
258, and 8
Johns. R. 446,
Beals v.
Guernsey;
but 1 Cranch
309.—Cowp.
432.—
1 Johns. Cas.
156.—1 Ld.
Raym. 286.—
5 Johns. R.
336.

§ 23. *A Blank, with hand and seal affixed, is not a memorandum within the statute of frauds.* As where L wrote his name and affixed his seal on the back of a lease, and agreed by him and T, that C should write an assignment over the

2 Johns. R.
430, Jackson
v. Titus.—
See Ch. 11,
a. 13.

CH. 32. name and seal, so as absolutely to convey the lease to T. C
 Art. 6. did it accordingly, and delivered the lease to T. Held, a nullity, and no note in writing. Rob. on Frauds 113, 119.



ART. 5. *Statute of Frauds.* Further cases on it, as it respects paying another's debt, see Ch. 9, a. 20. And as to, 1. Executors and administrators. 2. As to another's debt. 3. As to marriage. 4. As to agreements not to be performed in a year. And 5. As to contracts for £10 or more, see Ch. 11, a. 4, for sundry cases, and Mass. Act of June 20, 1788, copied from 29th of Ch. II., passed April 16, 1677. As to lands and interest out of lands, see Covenants, Ch. 11.

2 Sel. 732,
 Rann & al.
 exrs. v.
 Hughes,
 admr.; and
 7 T. R. 350.
 —Roberts on
 Frauds 8,
 201, Barrell
 v. Trassell.—
 4 Taun. 121;
 and 1 Phil.
 Evid. 359,
 Wheeler v.
 Newton.—
 Pr. Ch. 16.

ART. 6. *As to executors and administrators.* § 1. *Disputes arose between the testator and intestate.* Award that the latter pay the former £——, on a given day. The intestate died leaving sufficient to pay this sum. This was not paid when the testatrix died; by reason of which, as the declaration stated, the deft., as administratrix, became liable to pay the plts., as executors, this sum, and being so liable, the deft. (*not saying as administratrix*) promised to pay. First plea, *non-assumpsit* and issue, and three other pleas. Verdict on the first issue, and judgment against the deft. generally. Error brought—and held, there was not sufficient consideration to support this demand, as a personal demand against the deft., as she derived no benefit from the promise; for it was a promise generally, to pay on request, what she was liable to pay as administratrix, not on any foundation, as forbearance &c., and its being in writing (as presumed after verdict,) would not aid the case, for a mere written agreement requires a consideration. And 3d, this consideration is still essential, notwithstanding the statute, and this does not charge executors and administrators further than by common law they were chargeable.

Roberts on
 Frauds 200,
 204.

§ 2. To be within this act, one must be executor, that is, actually appointed by will, though not proved, or administrators having actually received administration, at the time of making the promise.

Ch. 9 & 11.
 —Case v.
 Barber 202,
 cited 1 Phil.
 Evid. 359.

§ 3. This act has made no difference in pleading; hence if the promise be in writing, it need not be stated in the declaration; but the consideration must be stated, where it was necessary to state it before the statute. But whether the consideration must be stated in the writing is a question already considered; but a plea must state the promise in writing, when pleaded in bar of another action, that it may appear to be a contract on which an action will lie; for to take away the plt's. present action, another must be given him on the agreement or promise pleaded. For the plt. may declare, at common law, and prove in evidence the writing, the statute adds; but where the deft. pleads a second promise necessary to be in writing,

in bar of an action on a first promise, and does not plead the second in writing, and the plt. demurs to this plea, as he may, the deft. can have no opportunity to prove it is in writing.

ART. 7. *For the debt or default of another*, see Ch. 9, a. 20, sundry cases. § 1. Declaration that the deft., in consideration that the plt. would let his horse to hire to J. S., promised the plt. that J. S. should re-deliver him; and that he had not &c.; verdict for the plt., set aside, for J. S. was liable in *detinue* as well as *trover*; therefore the deft.'s. promise was *collateral*, and to answer the default of J. S., though objected that he was liable only in *trover* for a wrong subsequent to the delivery, but the court said he was liable in *detinue* on the original bailment, implying a promise in J. S. to re-deliver; this existed when the deft. promised; but if no promise by J. S. to re-deliver, then the deft.'s. had necessarily been original.

§ 2. *The deft. acquires a right, as well as pays another's debt. Assumpsit &c.* The plt. was Grayson's general agent, and effected for his use policies of insurance to a large amount, and was under acceptances for him for bills drawn by him for his own use, and the plt. had a lien on these policies to indemnify himself against the said acceptances. On these policies a loss happened, and the assurers agreed to pay; but which Grayson could not receive without having the policies to produce. These the plt. held as security against his acceptances of Grayson's bills; these the plt. delivered up to the deft., on his promising that he would provide for paying said acceptances as they became due, that the deft. might collect them for his principal of the insurers, and the deft. received the monies so due. The court held, that this was not a promise for the debt or default of another, within the statute of frauds; and that the plt. might recover against the deft. as well for the breach of his agreement in not providing for the payment of the acceptances, as also upon a count for money had and received. No debt was due from Grayson to the plt. when the deft. made this promise, as the plt. had not paid his acceptances. On the whole, this was considered as a purchase by the deft. of the plt.'s. interest in the policies, though the discharge of another's debt followed.

§ 3. This case of *Anstey v. Marden*, was on the same principle. This was *assumpsit* for not replacing some bank annuities, the produce of which the plt. had paid to the deft., on his promise to replace the same in a certain time. The defence was, that the deft. being indebted to the plt., as stated in the declaration, and also to several other persons, his affairs were examined and he was found to be insolvent; thereupon the plt. and his other creditors, and J. S., agreed that J. S. should, out of his own monies, pay the plt. and the other

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2 Selw. 734,
Buckmyr v.
Darnell.—
Roberts on
Frauds, 218
to 223.—
6 Mod. 248,
250.—1 Phil.
Evid. 360.—
2 Ld. Raym.
1087.

2 East 325,
Castling v.
Aubert. This
case is cited
in 2 Sel. 741,
242, and in
Roberts on
Frauds, 228
to 232, cited
1 Phil. Evid.
362, 363, see
Williams v.
Leaper, Read
v. Nash, Bar-
rell v. Tras-
sell, Anstey v.
Marden,
Watson v.
Turner.

2 East 506.—
4 Maule &
Sel. 275.

1 Bos. & P.
124, Anstey
v. Marden.—
2 Sel. 742,
743; and in
Roberts on
Frauds 225,
229, 231. plea
is at large.

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creditors 10*s.* in the pound, in full, and that they should assign their debts to J. S., and J. S. accordingly tendered of his own money 10*s.* in the pound on the plt's. debt, which he refused to accept. It was objected that as J. S's. promise was not in writing, the defence could not be supported. But the court overruled the objection. Chambre J. observed, "that this was a contract to purchase the debts of the several creditors, and not a contract to pay the debt of the deft." And this purchase is not prohibited by the statute of frauds. It was not to pay another's debt, but a new purchase.

Roberts on
Frauds, 216,
216.

§ 4. Wherever the deft. is the *original* undertaker, and his promise is not *collateral* to that of another, and it can be so only where there is such other promise, and the credit is given to another, the proper action is *indebitatus assumpsit*; but where the deft's. promise is *collateral*, a special declaration is necessary, stating his liability. Hence, the question if *original* or *collateral*, may sometimes arise on the rules of pleading.

Roberts on
Frauds, 223,
Watkins v.
Perkins.

§ 5. If a shop-keeper deliver goods to A, on my credit, and my *original* promise to pay, this cannot become *collateral*, if A afterwards make himself liable. What words constitute an *original* or *collateral* promise, admits of distinctions almost endless, depending on the words used, intentions of parties, and the circumstances in the case; all which must be referred to the jury to decide to whom the credit was given.

§ 6. Though it is clearly settled that the original promise or liability must exist at the moment the collateral promise is made; for this is *relative*, and can exist but where that does, yet it is not clearly settled that the *collateral* engagement ceases, as soon as the person ceases to be liable, for whose benefit it was made. But the word *collateral*, however, is not in the statute. But may it not be a fair construction of this act to say that if I undertake to answer the debt or default of another, I remain liable, though he does not, when the thing engaged is not performed? If my son owe a debt, and I engage to pay it, and the consideration of my engagement is his immediate discharge, he ceases to be liable; yet do I not promise to pay another's debt, and therefore must not my promise be in writing?

§ 7. Though there may be a liability in A to pay a debt, or do an act, yet if I, upon a *distinct superadded consideration*, engage to do it, my promise may be *original* and out of the statute.

Love's Case,
1 Salk. 28.—
Ch. 1, a. 41.
Meredith v.
Short,
1 Salk. 25.

§ 8. As where A owed a debt on execution, and a *stranger* promised the sheriff's officer to pay it, in consideration he would restore goods taken on execution by *fieri facias*. Here the restoration of the goods, at the stranger's request, was the *distinct superadded consideration*, and the stranger's promise was

an original one. The same is the case if A owe £100 on his note, and I engage to pay it, in consideration the note be delivered to me. CH. 32.
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§ 9. So where Gill, the deft., promised the widow and administratrix of the intestate, that if she would allow him to be joined in the administration he would make good assets to pay the debts of the intestate: this permission was the new distinct consideration, and the ground of an original promise. Roberts 233,
Thomlinson
v. Gill.

§ 10. So in the case of Reed v. Nash, Ch. 9, a. 20, where Nash promised to pay a sum of money in an action against Johnson, that he never owed, damages for his tort, never having been ascertained. See Ch. 9, a. 20, s. 6.

§ 11. But this distinct superadded consideration must be the main motive for the promise, to make it *original*; for if A owes £50 on an execution, and I promise the officer to pay this debt, if he will forbear ten days, my promise is *collateral*, to pay A's debt, and must be in writing, to be binding; for though this forbearance is the distinct superadded consideration, yet my main motive is to pay A's debt; that is the direct purpose of it. The payment of his debt is not a thing that arises *collaterally* or *eventually* on my undertaking. Where the *moving* consideration of my promise is to discharge myself, my promise is *original*, though the discharge of another, or of another's debt, may eventually follow.

§ 12. In this case, stated above, one Vickars owed the plt. a debt and was sued, and the deft. promised to pay it, if the plt. would stay his action against Vickars. Here a debt subsisted at the time of the promise, and Vickars' liability was the moving cause of the deft's. promise. Vickars' liability was so immediately the ground of the action against the deft., that it could not have been supported against him, without showing the liability of Vickars existed when the deft. made his promise. One promise never can be *collateral* to another, but where the other *does exist*. A promise to pay a third person's debt, though on a good consideration, must be in writing. Simpson v Patten, 4 Johns. R. 422, 423; Jackson v. Raynes, 12 Johns. R. 291; Kirkham v. Martin, 3 Barn. & Ald. 613. See Fish v.
Hutchinson,
Ch. 9, a. 20,
cited 1 Phil.
Evid. 361,
362.—See
Rothery v.
Curry, Bull.
N. P. 281.—
King v. Wil-
son, Stra. 873.

ART. 8. *As to marriage*. It was held formerly, that *mutual promises to marry* were within the act, but of late years the law has been held to be otherwise. The statute only respects promises made *in consideration of marriage*; not promises mutually made to marry. See Ch. 46, a. 4, s. 1; 3 Bul. N. P. 280; 1 Stra. 33. See Ch. 11,
a. 4.—3 Lev.
65, Philpot v.
Waller, cited
1 Phil. Evid.
363, 364.

ART. 9. *As to the sales of lands, interests in or concerning them*. See Ch. 11,
a. 6.

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6 East 602,
Crosby v
Wadsworth,
and many
cases cited.—
See Ch. 109,
Fraudulent
Conveyances
of Land.—12
East 514.—
2 M. & S.
208, 461.

§ 1. June 6, 1804, the plt. agreed by *parol*, with the deft., for the purchase of a standing crop of mowing grass, then growing in the deft.'s. close, in Claypole, for twenty guineas. The grass was to be mowed and made into hay by the plt., but no time was set for doing it; no earnest was given, nor any note in writing, nor did the plt. take possession; but it was retained by the deft. July 2, deft. told the plt. he should not have the grass, and sold it to W. Carver, for twenty-five guineas. Plt., July 12, tendered the twenty guineas to the deft., which he refused. July 13, plt. by his man finding the gate unlocked, entered and mowed about half the grass. July 15, the deft. forbid the plt.'s. taking the grass, and locked the gate; and by the orders of the deft. Carver carried away all the grass, including that mowed by the plt. Judgment for the deft.; for this was a contract *or sale of an interest, in or concerning land*, so void by the statute of frauds. But had it been in writing, the plt. would have had such an exclusive possession as to have maintained *trespass quare clausum fregit* against any one entering the close and taking the grass, even with the owner's consent. And such *parol* contract may be discharged by *parol* notice from the owner, before any part execution of it. And the first section of the statute of frauds, as construed by the second, is meant to avoid *parol* leases &c. conveying a greater interest than for three years, and whereon a rent is reserved. This could be no sale of *goods, wares, and merchandise*, within the seventeenth section of said act. The crop, June the 6th, being a *portion of the freehold*, "and not *moveable goods or personal chattels*." But the act did not vacate this contract, expressly or immediately touching an *interest concerning lands*; it only precluded the bringing of actions to enforce it by charging the deft. on it. Had it been executed, the parties could not have treated it as void, because by *parol*; but as it was *executory*, it was discharged by the deft. before any part was executed, July 2d. But if A raise grain on B's land, remaining in his possession, A may sell it growing, by *parol*; it is only a *chattel*. 2 Johns. R. 421, n. *Newcomb v. Ramer*; 2 Johns. R. 52, 418; 1 Bos. & P. 397; 2 Bos. & P. 452. The right to conduct water by a tunnel over another's land, cannot pass without deed. 6 East 604; see ch. 71, a. 3, s. 4.

1 Bos. & P.
392, *Poulter*
v. Killing-
worth.—2
Selw. 744,
745.

§ 2. *Land at the halves*. In this case the plt. had let to the deft. land without rent, from which the deft. was to take two successive crops, and to render to the plt. a *moiety of each*, in lieu of rent. Afterwards the value of the crops was ascertained by appraisement, and the deft. became liable for a moiety of this value to the plt., in lieu of a moiety of the crops themselves. The plt. brought *indebitatus assumpsit* for

this moiety sold to the deft., not stating the special agreement, and recovered; for this was executed by the appraisement, and the action arose out of something *collateral* to it; and the court was rather of opinion that such an agreement need not be in writing under the statute of frauds. It was contended on the deft's. part, that this action could not be supported, as a *special* agreement had been proved. And that this was within the statute of frauds, as it related to *lands*, and as it was not to be executed within *a year*. But the court held the appraisement put an end to the point of the special agreement; as by it the deft. was to keep the crops, and pay a moiety of the value; this amounted to goods sold and delivered.

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Buller J. Had there been no appraisement, this objection to the form of the action must have prevailed, and this agreement does not relate to any interest in the land. Per Ellenborough C. J. The contract originally was "to render what should have become a *chattel*, that is, part of a severed crop in that shape, in lieu of rent." This opinion may be just, if we view only one side of the contract, the plt's. right under it, to demand a *mere chattel*, a moiety of a severed crop. But can it be correct, viewing the original contract as it was, and by which the deft. was to occupy the land, and to take two crops; as to him it clearly was of an *interest in or concerning the land*, more so than was the case of the purchaser of the crop in *Crosby v. Wadsworth*. And it must be a novel opinion, that a contract must be *concerning lands*, as it respects the lessee, at the halves, and not concerning lands, as it respects the lessor. It must seem, if the contract respected, or was concerning lands, in any respect, it was so in toto. If I agree to buy black-acre of A, and to pay him \$100 for it, his claim or side of the contract is only to the money; mine to the land. It surely cannot be law to say this contract is not of an *interest in or concerning lands*; yet according to several cases, a contract must one side be in writing, and the other may not be.

6 East 612.

Crosby v.
Wadsworth.

In this case the deft. agreed, by *parol*, to allow the plt. to stack coals on his close for seven years; and that during this time he should have the sole use of that part of his close. When the plt. had accordingly for three years stacked coals there, the deft. locked up the gate of the close. The majority of the court held this agreement good for seven years. As the agreement was only for an *easement*, and not for an *interest in the land*, it did not amount to a lease, so good. Foster J. agreed this did not amount to a lease, but thought the words in the statute of frauds, "*any uncertain interest in land*," extended to this agreement, so not good for above three years.

See Ch. 74,
a 10, s. 6.—
2 Sel. N. P.
728, 729,
Wood v.
Lake, cited 1
Phil. Evid.
356.—5 Johns.
R. 271.

CH. 32.
Art. 9.



But a contract to sell and deliver the possession of, and improvements on, lands, must be in writing by the statute, as an interest in land. Collateral agreements not within the act, 12 East 513; 7 Johns. R. 205, *Howard v. Easton*; Sugd. Ven. 56.

8 T. R. 3,
Clayton v.
Blakey.

§ 3. *Shall have the force and effect of leases at will only.* In this case the deft. had held the premises two or three years, under a *parol* lease of twenty-one years from a certain day named, to which the notice to quit referred. It was objected that this was but a lease *at will*, by the statute of frauds by legal construction, and as there was no count as on a lease *at will*, the declaration was bad. But there was a count that stated a holding from year to year determinable, May 12, 1797. Held, the declaration was good, "for such a holding now operates as a tenancy from year to year; that the meaning of the statute was, that such an agreement should not operate as a term; but what was then considered as a tenancy at will, has since been properly construed to enure as a tenancy from year to year." Though this reasoning may apply to our province act, or to written leases on our act of March 10, 1784, mentioning no time, yet it cannot be applied to our *parol* lease on that act, as the statute is express it shall be considered as a lease *at will* only. But of late years courts have as much as possible leaned in favor of leases from year to year where no time is stated. 8 Burr. 1609; 2 W. Bl. 1173.

Parker v.
Stoniland, 11
East 382.

Warwick v.
Bruce.

Emmerson v.
Heelis.—See
Frear v. Har-
denburgh, 5
Johns. R. 272.

§ 4. *Potatoes sold before dug, a mere chattel.* As where A agreed to sell B a crop of potatoes in a close, at so much a sack, to be got immediately. Held, the contract was confined to the sale of the potatoes, and conveyed no interest in the land, but merely an easement, a right to come on the land for the purpose of digging and carrying away the potatoes. And 2 Maul. & Sel. 205, the contract was for all the potatoes growing on a certain piece of land, at so much an acre, to be dug and carried away by the purchaser. Held as above, and that the contract was for a mere chattel. See *Whipple v. Foot*, Ch. 136, a. 16, s. 16. In *Warwick v. Bruce*, the contract was made about the time of digging potatoes, so different from *Crosby v. Wadsworth*, and other contracts that have for their object long possession of the land. But decided otherwise as to a crop of Turnips, 2 Taun. 30, *Emmerson v. Heelis*. The Common Pleas held, that a public sale at auction of several lots of turnips then growing, was a sale of *an interest in land*, so within the statute of frauds; and the court referred to *Waddington v. Bristow*, 2 Bos. & P. 452. The difference seems to be solely in the opinions not in the cases.

§ 5. As to the estate's being void, and the *parol* contract as to lands being valid so as to recover damages, see *Daven-*

port v. Mason, Ch. 93, a. 3, s. 41; Hollis v. Edwards, 1 Vern. 159; Bell v. Andrews, 4 Dall. 152; Ewing v. Tees, 1 Bin. 450. This distinction is by no means well settled except perhaps in Pennsylvania, in the statute of which state, the provision in the 4th section of the 29th Ch. II. is omitted. As to a parol license to erect mill dams &c., see Thompson v. Gregory & al. Ch. 74, a. 8, s. 4. The case of Wood v. Lake seems to be questioned by Sugden, on the good ground, that in fact it was a lease for seven years, but see 2 Marsh 431.

CH. 32.
Art. 9.

Sugd. Ven.
57, 60.

§ 6. Sugden's editor in noticing Parker v. Stoniland above, refers to many American cases, as Boswick v. Leach, Frear v. Hardenburgh, Newcomb v. Ramer, Hughes v. Moore, Boyd v. Graves, Howard v. Eaton, Storms v. Snyder, Sherburne v. Fuller, Boyd v. Stone, all in this work, see table of cases. He further refers to Paxton's Lessee v. Price, 1 Yeates 500; Rice v. Rat, 15 Johns. 503; Henderson v. Hudson, 1 Mun. 510; Ebert v. Wood, 1 Bin. 216.

§ 7. *What is a sufficient agreement*, see Hatton v. Gray, Ch. 1, a. 7, s. 46; Cotton v. Lee, id.; Seton v. Slade, and cases, Ch. 115, a. 10, s. 10; Wain v. Warlters, Ch. 1, a. 53; Ch. 9, a. 20, s. 33; Ch. 11, a. 14: and sundry other cases there cited. See also 3 Taun. 169; 15 Ves. jun. 286, Bateman v. Phillips, 15 East 272; and Clason v. Baily, 14 Johns. R. 484 &c.; 2 Ball and Beatty 58, 371; also Ch. 9, Ch. 11, and Ch. 32, generally; 9 Ves. jun. 234; 12 do. 466.

Buckhouse v.
Crosby, 2 Eq.
Ca. Abr. 32,
pl. 44—
1 Root's R.
172, Allen v.
Bennet.

§ 8. *Equity is as much bound by the statute of frauds as the law is*. What, said Lord Eldon, is the construction of it, what within its legal meaning, and what is a legal signing, are questions the same in equity as at law. In the construction of it, equity follows the law. 3 Hen. & Munf. 144 to 199, Argenbright v. Campbell & ux., and many cases there cited. 18 Ves. jun. 183; 14 Johns. R. 488. Lord Mansfield's opinion above stated, that neither a court of law or of equity can make a contract for the parties, but can only inquire what is its legal meaning.

3 Taun. 176,
Givens v.
Calder.—3
Desaus. Ch.
R. 189.—2
Call. 185.—
Roberts on
Frauds 167.

§ 9. *The agent how authorized*. By the first and third sections of the statute of frauds, as to leases &c., must be by writing. Not so by the fourth and seventeenth sections, but by these it may be by *parol*. These sections, fourth and seventeenth, respect *agreements* to convey property. The auctioneer is the purchaser's agent merely by his implied authority to write down his name and bid; (however decisions are different on this point.) Standfield v. Johnson, 1 Esp. Ca. 101; Coles v. Trecothick, 9 Ves. jun. 234; White v. Proctor, 4 Taun. 209; Kernys v. Proctor; so if he bid by an agent, 2

Sugd. Ven.
&c. 74, 75,
76.—See Ch.
9, Ch. 11,
Brown v. Gil-
liland.—3
Desaus. Ch.
R. 640.—3
Ves. & Bea.
57.—2 Cam.
203.—1 Smith
233.

CH. 32. Taun. 38 ; 4 do. 209. Neither of the contracting parties can be the agent of the other.

8 Ves. jun. 337.—6 Ves. jun. 617.—Whichcote v. Lawrence, 3 Ves. jun. 740, 752.—Hall v. Noyes, 3 Bro. C. C. 483.—2 Bin. 59.—13 Ves. jun. 601.—4 Bin. 43.—2 Raym. 108.

§ 10. If the deft., in chancery, insist on the statute, though he confess the parol agreements, he will be held to perform—the better opinion, after various opinions, see Sugden's Vendors &c., 77 to 82, and many cases cited by him. One confidentially employed to sell as executor, trustee, agent, attorney, guardian, &c. cannot purchase. *Equity* fears they will use their influence and knowledge fraudulently to their own advantage, if allowed to purchase, so, on a general principle, forbids all such purchases, except in special cases, and where there is perfect fairness. Crowe v. Ballard, 3 Bro. C. C. 120 ; Fox v. Mackreth, 2 Bro. C. C. 400, 420 ; Cookson v. Whelpdale, 1 Ves. 9 ; Campbell v. Walker, 5 Ves. jun. 678, 683 ; 3 Desaus. Ch. R. 26 ; 3 Munf. 251 ; 4 Desaus. Ch. R. 651, Butler v. Haskell ; Jackson v. Van Dalsen, 5 Johns. R. 43, 48 ; Reynolds' Case, 5 Ves. jun. 707, 708 ; Davorce v. Fanning, 2 Johns. Ch. R. 257 : 3 Bro. P. C. 63 ; 10 Ves. jun. 381, 393 ; Dawson v. Massey, 1 Ball & Beatty 219. The objection is, a trustee cannot purchase of *himself*, not that he cannot purchase of the *cestui que trust*. 4 Desaus. Ch. R. 487, 504 ; 1 Peter's R. 368 ; 10 Ves. jun. 246.

Agreements not to be performed in a year, see Ch. 11, a. 4, above.

Towers v. Osborne, 2 Sel. 750 ; doubted Ch. 11, a. 4, s. 10.

ART. 10. *Goods to the value of ten pounds &c.*, see Ch. 11, a. 4. § 1. This case is further explained, as above ; the deft. bespoke a chariot, and when made refused to take it, and held not to be within the statute. On this case it is observed in Selwyn, that it was not a contract to buy goods, but for the making of something which had not any existence at the time ; Lawrence J. 7 T. R. 17, observed, this case went on the general principle that executory contracts were not within the act, "if by that were meant contracts for the sale of goods to be executed on a future day, such a construction would be a repeal of the act ; but if it only meant such contracts as were incapable of being executed at the time, then the decision was right, and such was the case then in judgment."

Gross. J.

1 East 192, Chaplin v. Rogers, cited 1 Phil. Evid. 381—Hodgson v. Le Bret, 1 Camp. 233—The buyer writes his name on the goods is a delivery.

§ 2. A and B being on the spot, A sold to B a stack of hay, and B actually sold part of it to another person, who took it away ; this was a delivery to and acceptance by B, so as to take the case out of the statute of frauds ; to do which on the sale of goods of the value of £10, or more, there must be either 1st, a delivery of them, or of a part of them ; or 2d, payment of the consideration ; or 3d, the agreement must be reduced to writing. But where goods are ponderous the delivery of the key of the warehouse &c., will do. "So if the

purchaser deals with the commodity as if it were in his actual possession, this will supersede the necessity of proving an actual delivery," as in the case of the hay stack, above, then there is no danger of deceiving others. CH. 32.
Art. 10.

§ 3. The plt. was told by the deft. that he had a quantity of rice to sell, and the plt. produced the deft's. order to Bennet & Co. to deliver to the plt. 20 barrels of rice; and the plt. proved by a witness, that the deft. told him that he had sold 20 barrels of rice to the plt. for 17s. a hundred. Plt. delivered the order to Bennet & Co., who refused to deliver the rice, because forbidden by the deft. Held, this order amounted to a delivery, so as to take the case out of the statute. 2 Esp. 596.—
2 Selw. 761,
Searle v.
Keevas, cited
1 Phil. Evid.
381.—13
Johns. R.204.

§ 4. It has been decided that where a *sample* is delivered to, and accepted by, the purchaser; and this is to be accounted for, as part of the commodity sold, this will take the case out of the statute. But otherwise if not a part of the commodity sold at large, Ch. 62, a. 5, then it is no delivery of a part of the things sold. 7 East 558,
Hinde v.
Whitehouse

§ 5. *Contract void as to land, is void as to goods.* As where A agreed to sell *lands* and *chattels* to B. Plea the statute of frauds. A, during the negotiation, delivered a particular list of the whole goods &c., signed by him. Afterwards an agreement was made for a less price. Both parties gave instructions to the attorney to prepare the conveyance; and the deft. A, delivered to him the list of particulars, as instructions for the deed, which was prepared. But the court held the plea good, and that the agreement, being void as to the lands, was void in regard to the goods. 2 Com. D.
342, Chan-
cery 2 C. 4.

§ 6. In *assumpsit*, by the vendor against the vendee of land, for not accepting it, and paying the purchase money, the plt. averred he was *seised in fee* of the land, and that the deft. agreed to purchase it, *on having a good title*; and that the plt's. title to the land was made good, perfect, and satisfactory to the deft.; and that the plt. had been always ready and willing, and offered to convey the lands to the deft., but he did not pay the purchase money. On special demurrer, held good. For what the plt. averred was tantamount to performance of his part of the agreement, so as to entitle him to recover for the breach on the deft's. part, in not paying the purchase money. This was a sale at auction on various conditions of sale in writing, £300 earnest paid by the deft. Long special counts; special pleas and replications; special demurrer thereto, assigning special causes. Held, enough for the plt. to state his title thus generally; especially that it was made good, perfect, and satisfactory to the deft. *Seisin in fee*, is intended a *legal* seisin. It is the purchaser who is 6 East 556,
Martin & al.
v. Smith.—
2 Smith 543.

Baxter v.
Lewis, 1
Forrest's R.
Excheq. 61;
but 6 Taun.
561, case of
Standley.—
Sugd. 191.

CH. 32. bound to prepare and tender a conveyance. 5 East 106,
 Art. 10. Seward v. Willock, 2 Atk. 208; Wilnot 218.

11 Mass. R.
 494, 498,
 Randall v.
 Rich.

§ 7. *Surrender of a leasehold estate valid, though not in writing &c. Assumpsit for money had and received.* October, 1808, Rich leased (under seal) a house to Randall, for one year. To secure the rent, Randall put into the hands of Rich the negotiable note (\$183.75, on interest,) of Amos Wright. Randall occupied two quarters and part of a third, and moved out. Towards the latter part of the third quarter Rich let this house to Mrs. Cooper, who entered &c., and became responsible for the rent to Rich, he having received the key of Randall when he went out, delivered it to her when she entered. Held, this was a legal surrender of this leasehold estate for a year, and a determination of the lease, though under seal, though by our statute of frauds, surrenders, &c. must be in writing. And if the lease was not ended by these acts, Rich's putting in Mrs. Cooper might be considered as an ouster of Randall, and so his rent at an end. Rich, without consulting Randall, sued said note in the name of *Rich*, and took *lands* in execution, and his title had become absolute. Held, Randall entitled to recover, in this form of action, the balance of the note over the rent he owed, though objected Rich had received only *lands*, not *money*; for this suit and levy might be considered a voluntary appropriation, by Rich to his own use, of the note, as in *Floyd v. Day*; especially as he did not offer to convey the land to Randall, or consult him as to the mode of satisfying the execution; for "the satisfaction of the execution ought to be considered as the payment of the debt in money," and the land was taken at money's worth.

§ 8. *Contracts as to land, not in writing, how made good. General principle.* By the statute of frauds, 29 Ch. II. and our statutes, the general principle is, that all devises, legacies, and conveyances of any interest in lands, or contracts to convey such interest, must be in writing, or be void. The danger and evil these statutes meant to guard against, were the mistakes, the want of recollection, the prejudices and frauds of the witnesses to the devises, agreements, and bargains, on these subjects, not in writing. But writings have not been required when these mischiefs could be avoided without resorting to the witnesses, and have been attended with such facts and acts of the parties, as have proved the terms of them, though these facts and acts have been proved by *parol* evidence, especially as to conveying interests in lands. The grounds taken in these respects have varied. Once it was held, that as the statute of frauds required these matters to be in writing, as all devises, for instance, the whole intention of the devisor, or grantor of

an interest in lands, must appear in writing. Hence, however clear the evidence was, the devisor meant to give in lieu of dower, for instance, it was to no purpose if his meaning was not expressed in writing. But now a different construction of the statute is given; and we may prove the existence of a contract in these cases, by proving facts, the existence whereof cannot be accounted for, on other grounds than the existence of a certain contract or agreement. Thus A makes an absolute deed of black-acre to B. But A says it was a mortgage. B denies this. A offers to prove, by C and D, who heard the bargain, this fact. But they are not admissible witnesses to the terms of it, as it respects land. The statute holds it unsafe to trust to the recollection of the witnesses to the very terms of the contract, and hence rejects them. But A can prove certain facts in the case to exist, where there is no such danger of mistakes or mis-recollections, which facts clearly prove a contract must have existed, and the precise terms of it to a common intent; and the court sees these facts could not have existed, unless there had been such a conveyance of black-acre as A alleged there was. This he may do on the modern construction of the statute. He therefore proves by witnesses, that when he gave this absolute deed to B, B held against A a bond for \$500, that B has retained that bond for seven years, and annually received the interest on it from A. That A, with B's privity and consent, has remained in possession of black-acre the whole time, and has never been called on to pay any rent to B. That A has repaired and paid the taxes as on his own estate; also received the profits from year to year, as of his own lands. Thus it is proved that A and B have invariably acted exactly as mortgager and mortgagee always do act; and most unnaturally, if B has been all the time absolute owner of this black-acre. Now these facts prove the deed was a mortgage. This manner of proving the fact, the deed was a mortgage, by proving these facts by parol evidence, is correct, as such facts are usually proved by such evidence. And all such evidence is properly admissible on A's bill in equity, (the usual course to redeem;) and chancery treats B as trustee. Facts are thus proved, which prove the very terms of the contract

§ 9. So if the party to be charged confesses in writing, as in his plea, his answer, &c. the exact terms of the contract set up by the party claiming the benefit of it. This also takes the case out of the statute on its modern construction, for the court sees the contract is proved without relying on the witnesses for proving the terms of it, and without danger of mistakes or perjuries. This seems to be a liberal and fair construction of such statutes; but I doubt the conclusion an able

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CH. 32. judge has drawn from it, namely : that any fact which shews the testator's intention, though *dehors* the will, may be proved

Art. 10.



to get at his meaning and true construction of it, provided the fact stands well with the will ; for this any fact, though it may tend to shew the testator's intention, yet it may have no relation to the terms of the devise or bequest set up or claimed. Whereas every fact proved in the above case, (and in every case in which properly admitted to be proved,) was of a nature not to exist if the terms of the contract, the mortgage contract set up had never existed.

Loft 342,
Walker v.
Chapman.—
Loft 766.

§ 10. One will not be aided who comes to demand the performance of an illegal contract, but will be where he comes to annul it. And in the last case the law will relieve him, though *particeps criminis*, but see *Worcester v. Eaton*.

3 Dallas 415.

A promise to pay another's debt must be wholly in writing under the English statute of frauds (in force in Rhode Island.) It cannot be added to or varied, nor so far explained by *parol* testimony as to affect the import of the writing.

12 Mass. R.
26, Hills v.
Elliot. See
Sugden 461,
480. See the
word *voluntary* in the
Index.

§ 11. *Trust estates to defraud creditors &c.* may be proved by *parol* &c. Held, 1. The principle that a trust estate cannot legally exist without a declaration in writing, signed by the person holding the legal estate, does not apply to secret trusts and confidences, created for the purposes of defeating or delaying creditors, which may always be proved by *parol* ; and when so proved will defeat the formal transactions which may have been adopted for such purposes by the parties : 2. Where a mortgagee makes a deed of assignment on the back of the mortgage deed, or by a separate instrument referring to it, the assignee is put in the place of the mortgagee to all intents and purposes, unless a different intent is apparent from the contract : 3. Usury must be pleaded in an action on a specialty between the original parties : but 4. In a real action a purchaser may avoid a prior conveyance from the grantor, by giving usury in evidence on the general issue of *nul disseisin* : 5. Where a mortgagee assigned her interest in the mortgaged premises for money lent her, and verbally promised to repay the money and interest, except the assignee received the same from the mortgaged premises ; held, she was trustee of the assignee to the amount of the monies so promised. As to the purchaser he may not be apprised of the usury till it is too late to plead it, and when he offers to prove it, the adverse party may have time to rebut such evidence.

8 Johns. R.
399, 422, Bal-
ley & al. v.
Ogden, cited
1 Phil. Evid.
369 —

§ 12. The *form* of the note in writing required by the statute of frauds, is not material ; but it is material this note contain the substance of the agreement with reasonable certainty, so that the contract may be understood from the writing itself,

13 Johns. R. 297.—14 Do. 15.—1 Johns. Ch. R. 273.—11 East 142.

and without recourse to extraneous or *parol* evidence; and it must be signed by the party to be charged or by his agent. Hence, if A sell goods to B, and in his book of jobs enters B's name as the purchaser, and the terms of the sale are read to B's agent, making the purchase, who owns the entry is correct; this is not such note, not being so signed: 2. There may be a constructive delivery of the goods sold, and effectual, but then the acts done to be equal to an actual delivery, must be such as to leave no doubt of the party's intentions: 3. Where the vendor agreed with the vendee as to the storage of the goods, and a delivery by him of the export entry to the vendee's agent; held, not a constructive delivery so as to change the property. See *Whitwell v. Wyer & al.*, 11 Mass. R. 6.

§ 13. *An entire contract part void by the statute, is void for the whole.* As a *parol* contract to pay the plt. for an easement, a right of way over his land, (alone valid) also for a distinct piece of land (as to this invalid.) Held, the whole contract was void. Like principle, 1 Phil. Evid. 359, cites 2 Vent. 224; and 7 D. & E. 201, *Chater v. Bukett*; 3 Taun. 282.

CH. 32.
Art. 11.

8 Johns. R.
263, 266,
Crawford v.
Morrill.

ART. 11. *What a fraudulent conveyance to defeat creditors.* This respects personal estate as well as real; voluntary deeds relate to both. Frauds in conveying and in contracts to convey lands, and interest in and concerning them will be more fully considered under the heads of conveyances of, and contracts to convey lands &c. A few further cases may be stated here, though such conveyances and contracts to convey are more generally the grounds of real or land actions, yet by no means always so; but in many instances they are the grounds of *assumpsit*, as already appears. The price of lands conveyed if not paid, is usually recovered in *assumpsit*, where not claimed on a deed, and in this action the statute of frauds as to lands is often in question.

§ 1. If one be not embarrassed, his conveyance of his property for love and affection, is good against after creditors, and as to them is not fraudulent, and the jury may find he was not in embarrassed circumstances when he conveyed. And a voluntary conveyance of property; that is, for love and affection only, is good against all persons but such as were creditors at the time, and so against such if the grantor retain sufficient property, and especially lands, to pay his debts, and also keeps his credit good, and there being no evidence of secrecy or of trust, in the conveyance or about the time of it.

11 Mass. R.
421, *Bennet*
v. Bedford
Bank.—Bac.
Abr. Agreements
C. Sundry cases.
—Eq. Ca. Abr.
19, 28.

§ 2. A like principal recognised, as against one a creditor before the conveyance; and held, that by our statute of frauds, lands cannot be vested in interest by way of trust in

12 Mass. R.
376, *Jenny v.*
Alden jr.—
Eq. Ca. Abr.
19, 28.—*Pr. Ch.* 200.—1 *Vern.* 210, 220, 363.

CH. 32.
Art. 11.



one not grantee in the deed, where "there is no declaration of trust in writing, neither is there a resulting trust by implication of law," where "there is nothing in the deed which surmises a trust, or an interest in any person other than the grantee." No trust can be proved by *parol*. "The policy as well as the express provisions of our law being, that no title to real estate shall exist, except by deed or record."

12 Mass. R.
104, 111,
Northampton
Bank v.
Whiting.

Ambrose v.
Ambrose, 1
P. W. 323.—
Ch. 114, a. 14,
s. 6.

11 Mass. R.
342, Boyd v.
Stone.—
9 Mod. 86,
89.—Fr. Ch.
626.—Bac.
Abr. Agree-
ments, letter
C. See art.
12.

12 Mass. 277,
Fraser v.
Cushman.—
3 D. & E. 683.
Doug. 694.—
3 Johns. R.
528.—
4 Cranch R.
239.—Eq. Ca.
Abr. 19, 20,
21.

12 Mass. R.
456, Harrison
& al. v. Trus-
tees of Phil-
lips Acade-
my.—Mass.
Stat. June 23,
1802. See
art. 2, Good-
ale v. Nich-
ols; Sutton
v. Lord.

§ 3. Same principle as to resulting trusts was recognised in this case; and observed, as to the case of A's buying land with B's money, it must be "understood to be in cases where the *parol* evidence is not inconsistent with the deed."

In which case it is held, if the purchase money be in fact A's, yet if in the deed it is said to be B's, there can be no resulting trust to A. But as B, after A's death, executed a declaration of trust, this took it out of the statute of frauds.

§ 4. If the parties, A and B, really agree verbally on a mortgage, but A conveys absolutely to B, and he make a verbal promise, that on a day named, he will make a defeasance, so that A's deed to B shall operate as a mortgage, this verbal promise is void by the statute of frauds, as it directly affects an interest in lands: but 2. Where chancery will decree a specific performance generally, the injured party in a court of law may recover damages for breach of promise or contract: 3. Chancery will not aid where such a mere verbal promise is broken, being no more fraudulent than any other breach of trust or promise. Quære, as to the second rule are some exceptions.

§ 5. *Assumpsit* for money had and received, and also a special count. The deft. contracted in writing to convey lands to the plt. on the payment of a sum of money within a time named. At its expiration the plt. offered to borrow the money and pay it, if the deft. desired it; and he dissuaded the plt. from hiring it, saying he might pay at any time, and no advantage should be taken &c. Afterwards the plt. tendered the money and the deft. refused also to give the deed. Judgment against the plt.; he did not do what was equivalent to a seasonable tender of the money, he only offered to borrow the money. The disingenuous conduct of the deft. did not vary the law of the case.

§ 6. Question as to a fraudulent conveyance; the material points decided were: 1. If the grantor in a deed of lands has fraudulent intentions to delay and defeat his creditors, yet the deed is valid if the grantee in it be honest, and acts fairly: 2. If A make a deed of land to B for his security as creditor, without his knowledge, and get it recorded, the deed is inoperative till B accepts it, and when he accepts it the same is in fact delivered, and if then he make a bond of defeasance to A to

reconvey to A, on his paying what he justly owes to B, this is a good defeasance, and A's said deed to B is never any thing but a mortgage, a fair security : 3. If A keep the said bond in his pocket, not registered, that is the law's fault, not B's, if he do nothing to prevent its being recorded : 4. A may give the bond back to B, and let his title become absolute to so much of the estate as will honestly pay his debt. The facts in this case occupy many pages. Every deed is inoperative till both parties agree to it, on the principles of the common law ; and on those principles the honest grantee is not to be prejudiced by the fraudulent intentions of the grantor.

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Art. 11.

§ 7. An agreement void by the statute of frauds, made valid by the after acts of the parties. As where A and B contracted for the sale of twenty-five hogshheads of rum, and their contract was void by that statute ; but was nine days afterwards made valid, by payment of part, and delivery, &c. ; and the last transactions were viewed as the only bargain, because the only one of which there was legal evidence.

11 Mass. R.
6, 11.—2 Bos.
& P. 238.—
See ch. 11, a.
7, s. 1.

§ 8. *Fraud, in point of law.* A sells goods to B, by an absolute bill of sale by deed. If possession do not accompany and follow it, the sale is fraudulent as to creditors. This want of possession is not mere evidence of fraud, but is a fact, *per se*, that makes the sale fraudulent in point of law. (See the distinction taken in *Waite v. Hudson*, above, a. 4, s. 10, as to the statutes of James and of Elizabeth.) In this case the deed of the slave was *absolute*, and the vendor retained possession *unexplained*, and exercised ownership. See a. 13, s. 13, 16. Perhaps the best rule.

1 Cranch
309, 317,
Hamilton v.
Russell.—3
Cranch 89.—
2 Hen. & M.
302, 303.

§ 9. Fraud consists in *intention*, and that *intention* is a fact that must be averred in a plea, pleading fraud. But this court has decided that the offence is not in the *intention*, but in the attempt to smuggle goods, without paying the duties. Not a fraud to mortgage property for future advances ; 3 Cranch 73, 92. The mortgage was to secure the mortgagor's notes, at a certain bank. Held not fraudulent as to creditors generally. But in this case the consideration was good, and admitted no fraud was intended.

5 Cranch
351, Moss v.
Riddle.—1
Wash. 177.—
2 Hen. & M.
289. See
Adams v. Ad-
ams, there
fraud was
understood.

§ 10. On a view of the various cases on this subject of fraud, the material circumstance is the *intention* ; the view or *design to defeat creditors*. Therefore, if A has goods, and owes to his creditors large sums, and I take a bill of sale and possession of his goods, *with a design to defeat his creditors*, all is void, as the *delivery* of his goods to me, can never make such a transaction valid. So on the other hand, if his bill of sale be fair and *bond fide*, though he remain in possession of the goods, my title is valid. The few cases in which it is

CH. 32. said that such possession is *conclusive* evidence of fraud, are, it
 Art. 11. is conceived, not law; but no doubt is so far evidence of fraud,
 as to make it incumbent on me to explain why A remains in
 possession, after the bill of sale is made, and to prove the
 transaction fair and honest. And the possession must not be
 clearly inconsistent with the deed. As if A make an *absolute*
 bill of sale of goods to B, but A remains in possession, using
 them as his own; *Hamilton v. Russell*, above. Here "the
 separation of the possession from the title, is incompatible
 with the deed itself." It does not accompany and follow
 the deed, so by 13 El. is a fraud. Otherwise where a deed
 is on condition, which does not entitle the vendee to immediate
 possession, as explained in *Edwards v. Harben*, exr.; Ch.
 32, a. 116.

4 Wheaton
 503, Wheaton
v. Sexton's Lessee.

§ 11. *What a valid execution and deed.* A *scire facias* is
 duly issued and a sale is made under it, on a levy made be-
 fore the return day. The sale is good though made after
 that day, and the writ was not actually returned: 2. If a deed
 be made on a valuable and adequate consideration, actually
 paid, and the change of property is *bonâ fide*, or such as in
 the deed it purports to be, such deed cannot be viewed
 as a deed to defraud creditors. Was decided in an action of
 ejectment. The *scire facias* was against the goods, chattels,
 lands, and tenements of W., in the district of Columbia; he
 (Wheaton) two days before the judgment against him, made
 the deed to one Caldwell, conveying the premises to him in
 trust for Wheaton's wife. The court below instructed the ju-
 ry that it was void, if made by Wheaton, "without a valuable
 consideration therefor, or was made by him with intent to de-
 feat, delay, or defraud his creditors." The Supreme Court
 of the United States, observed, had *and* been used instead of
or, the deed had been clearly valid; but as it reads, it must
 mean that even had a valuable consideration been paid, if the
 deed was made with intent to defeat creditors, it was void:"
 said the Supreme Court, "we know of no law which avoids a
 deed, when a valuable (by which, to a general intent, must al-
 so be understood *adequate*) consideration is paid, and the
 change of property be *bonâ fide*, or such as it professes to be;"
 for the consideration paid, is a substitute by which the judg-
 ment may be satisfied.

4 Maule &
 Sel. 262, As-
 tley *v. Emery*.

§ 12. *What a sale of barley within 29 Ch. II, and not a
 mixed contract for the carriage as well as sale.* Plt. sued for
 the price of his barley, one Longstaffe, a corn factor, agreed
 to sell the deft., November 18, 1815, at 38s. a quarter, to be
 delivered at Longstaffe's warehouse at Derby, to go by his
 first boat at his expense. The barley was then in one Tur-
 ner's hands; the deft. desired him to see it delivered, and

measured, and properly put up—was sent by the first boat, and invoice delivered to the deft., who requested time to pay; but afterwards refused to accept the barley. Held, it was such contract, *though the price of carriage was included in the 38s.*; the defts'. appointing the particular boat, and desiring Turner as above, did not amount to an acceptance.

ART. 12. *Evidence of fraud in equity, &c.* § 1. Inadequate price in a bargain. This does not defeat it, merely because inadequate; but does where it shews the person did not understand the bargain he made, or was so oppressed, that he thought it best to make it, though he saw the inadequacy; for this proves a command over him, that may amount to *fraud*. 10 Vesey jr. 209, Underhill v. Harwood; 9 Vesey jr. 246; 7 Vesey jr. 30; 3 Br. Ch. R. 605; 10 Vesey jr. 292, 470, Burrows v. Lock; 1 Vern. 465; 13 Johns. R. 484; 11 Johns. R. 555; 1 Ball and Beatty 241; 1 P. W. 745; 1 Bro. C. C. 567.

§ 2. The inadequacy of terms may be material, and evidence of fraud, when the inquiry is, if an agreement shall be set aside, for supposed weakness of understanding in one of the contracting parties, or other material reasons. And when an agreement appears very unequal, and affords any ground to suspect any imposition, unfairness, or undue power or command, the courts will seize any very slight circumstances to avoid enforcing it. As where he that claims to have it executed, fails to make out his title in the time agreed; a circumstance generally not deemed material, where a contract is fair. But if one be equally and fairly made, it will be enforced, though by a subsequent event it becomes unequal. 3 Br. Ch. R. 605; 6 Vesey jr. 349, Paine v. Miller; but 2 P. W. 220; 7 Bro. P. C. 184; 4 Cranch 137; 1 Hen. & Mun. 110; 4 Vesey jr. 689, 690; 2 Vesey jr. 294, Buxton v. Cooper; 3 Atk. 383; 4 Dallas 250.

§ 3. One insolvent, *bonâ fide* assigned his estate for the benefit of his creditors, but continued in possession, at the request of the assignees, and for their benefit; who sold in a reasonable time. Held not fraudulent. No false credit was created, and the possession was consistent with the real intent of the assignment. So one having a large verdict against him, in favour of A, conveyed all his estate to a trustee, for the benefit of all his creditors in due proportion. Valid, though the trustee did not know of it, or accept till four days after; and the debtor remained in possession of the deeds and estate near two months. Here was no intent to defraud creditors. He might have preferred one; so, do an act to prevent any one getting a preference; 8 D. & E. 528. Not necessary to deliver the title deeds; and the non-delivery of the

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Art. 12.

Pr. Ch. 138,
538, Young
v. Clerk.—
6 Vesey jr.
253.—3 Dall.
502.—3
Wooddes 463

Eq. Ca. Abr.
19, 28.—
Sugd. 189.—
1 Atk. 12,
Gibson v.
Patterson.—
2 Vern. 280,
Cass v. Rud-
ele.—1 Br.
Ch. R. 157,
567.—1 Ves.
jr. 450.
3 Cranch, 27.
—1 John. Ca.
156.

Vredenburg
v. White.—
6 East 267.—
1 Ves. jr. 139.
—1 Bin. 603,
Wilt v. Frank-
lin.—4 Dall.
76.—1 Bin.
515.—1 Bay.
90.—4 Dall.
86.—4 East 1.

CH. 32. goods was accounted for ; John. 510, 525, Johnson v. Stagg.
 Art. 12. The registry of the mortgage, is notice to every after mortgagee, &c.

2 Ves. 155,
 Chesterfield
 v. Jaussen.—
 1 Bac. Abr.
 Agreement,
 letter C.

§ 4. Lord Hardwicke, enumerates four kinds of fraud :
 1. Fraud arising from facts and circumstances of imposition, which is the plainest case : 2. Fraud which may appear from the intrinsic value and subject of the bargain itself : such as no man not deceived, and in his senses would agree to ; or honest man impose or accept : such the common law notices : 3. Fraud *presumable* from circumstances and the condition of the contracting parties ; and this, in equity, goes further than the rule of law, which is, that fraud must be proved, not *presumed* ; but it is *presumed in equity*, to prevent taking any surreptitious advantage of the weakness or necessity of another ; which knowingly to do, is equally against conscience, as to take advantage of his ignorance : 4. Fraud may be collected in equity from the nature and circumstances of the transaction, as being an imposition and fraud on persons not parties to the fraudulent agreement.

2 Atk. 83,
 E. I. Comp.
 v. Vincent.—
 3 Atk. 692.

§ 5. It is said, if I see A go on in building on my land, through mistake or inadvertence, and I do not interfere or claim till afterwards, though I am all the time conusant of his right, chancery will oblige me to permit A to enjoy his building &c. quietly. Bunb. 53 ; 9 Mod. 37.

6 D. & E.
 554, the King
 v. The Inhabitants of
 Buterton.

This was a pauper case. A, the pauper's father, when he married, obtained from his wife's father, a spot of ground, but no conveyance, on which he built a house, and enjoyed it during his life, and his eldest son after him, in all near twenty years, uninterruptedly. Held, the younger children of A could not be removed. Lord Kenyon said, as twenty years nearly had elapsed since the land was given to A, the pauper's father, the court ought not to allow the title to be decided in this pauper cause. "After such a length of possession as this, perhaps a conveyance may be presumed to have been executed." And if a claim were now made by the father-in-law's heir, "he would, perhaps, be told in a court of equity, that as" the said father "stood by, while the pauper's father built on the land and treated it as his own, he could only resume the possession on certain terms." Lawrence J. "I remember a case some years ago, in which Lord Mansfield would not suffer a man to recover, even in ejectment, when he had stood by, and seen the deft. build on his land."

See Bay. 239.
 —6 Ves. jr.
 688.—12 Ves.
 jr. 85.

Abr. Eq. Ca.
 358, Blades
 v. Blades.—
 1 Dall. 435.

§ 6. So if the second purchaser, knowing of the first purchase get his own first recorded, it is a fraud ; and chancery decreed against him. See Norcroft v. Widgery ; also 3 Vesey jr. 478 ; 3 Mass. R. 575 ; Co. L. 290.

§ 7. *Where fraud is practised*, a want of a deed is no objection in chancery, and the case is not within the statute of frauds. As where A made a parol building-lease of ground, and when dying said, there should be one in writing; but his heir told him he would supply it; whereby, and other fraudulent practising, the lessee was hindered suing A, and getting the lease executed. The Lords held this was out of the statute, and made it good to the lessee.

§ 8. Many cases of contracts obtained by fraud, set aside in equity. See a. 29, s. 1, 2, &c., and above; also, 9 Vesey jr. 292, 473; 7 Br. P. C. 70; 2 Vern. 123; 2 Vesey 627; 2 Atk. 324; 2 Vern. 189, 206, 678; 3 P. W., 130, Osmond v. Fitzroy; see Bosanquet v. Dashwood, Ch. 114, a. 27, s. 11.

Osmond v. Fitzroy; a weak man gives a bond, but no fraud or breach of trust: equity will not set it aside, for this only, being *compos*, there being no equitable incapacity, where there is a legal capacity; yet great weakness of mind, though not legal incapacity, is ever considered, where connected with circumstances of fraud or surprise, to weigh in the case. 1 P. W. 203, Clarkson v. Hanway; 2 Ch. Ca. 103, James v. Graves; 2 P. W. 270.

ART. 13. *Equity, frauds in.* Cases of frauds in equity have already come into view in several places. Frauds in equity, in matters of contract, are much mixed with those in law.

§ 1. It is the object in this article to consider first, the kinds of fraud, as ably distinguished by Lord Hardwicke, as above, and by following these distinctly, and selecting principles and cases as they best apply to each, the whole may appear plain and easy to be understood: 1. Actual fraud arising from facts and circumstances of imposition.

Second. Fraud apparent from the intrinsic nature of the subject of the bargain itself.

Third. Such as arises from the circumstances and condition of the contracting parties.

Fourth. Such as may be collected from the circumstances and nature of the transaction, as being an imposition on others not parties to the fraudulent agreement. To the first description belong *suggestio falsi* and *suppressio veri*, by each or both of which a party may obtain a contract to his own advantage, and to the disadvantage of the other party, or of a third person. As if a devisee under a will defectively executed, assure the heir at law and recite in the deed that the will is well executed, and gets his release for a small sum, he being ignorant of the defects, and then tell him a real sale is proper to pay debts, and that the heir ought to join in it, and for another small sum

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Gilb. Eq. R.
11, Leister v.
Foxcroft.
Abr. Eq. 20.
2 Atk. 254.—
11 Vesey jr.
638.—2 Ves.
jr. 199.

New. on Con.
362, 363.—
3 P. W. 130,
Griffin's case.

See 1 P. W.
229, Broder-
ick v. Broder-
ick.—2 Eq.
Ca. Abr. 244,
486.—2 Bro.
C. C. 160,
Evans v.
Llewellyn,
Mead v.
Webb, 2 Eq.
Ca. Abr. 479.
—Kirk v.
Clark, 2 Atk.
254.—3 Bro.
C. C. 16

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gets his release, and then gets a sale for himself in trust secretly. Here the heir is deceived and defrauded, and both *suggestio falsi* and *suppressio veri*. In such case the heir is relieved repaying the sums he received with interest. The case of *Evans v. Llewellyn* will be found to have been decided on the same principle, see 1 Bro. P. C. 308; see also Insurance, Ch. 40, a. 11, Concealment; also Mortgages, Ch. 112; a prior mortgagee's suppressing or concealing his mortgage to a fraudulent purpose, see 2 Atk. 4^u; 2 Eq. Ca. Abr. 478 to 483, sundry cases. So if one solvent artfully act as if insolvent, and thereby procure his creditors to give up all or a part of his debt; this is a fraud, and equity will relieve the party injured. So if one make in a marriage settlement his conditional estate appear to be an absolute one, equity will relieve against such fraud and deception, 2 Eq. Ca. Abr. 481; and Ch. 114, a. 17, s. 13, and 2 Vern. 307. Fraud cannot be proved in equity, unless put in issue by the pleadings.

Webber v.
Farmer.—6
Johns. R. 543,
547, James v.
McKernon.

2 Bro. C. C.
179.—New.
on Con 66,
Day v. New-
man.—5 Ves.
485, Moth. v.
Atwood.—
Bro. C. C.
167, 175.—
2 Vern. 402.
See Heath-
cote v. Poig-
non, Ch. 139,
a. 7.—10 Ves.
jr. 300.—
1 Desaus. Ch.
R. 160.—
9 Ves. jr. 234,
White v. Da-
mon,—7 Ves.
jr. 10, Darby
v. Singleton.
—1 Wight. 25,
102.—Bro. C.
C. 149, Bar-
ker v. Van-
sommer.—
Gregor v. Da-
nean, 2 De-
saus. Ch. R.
639.—Deane
v. Rastron, 1
Anstr. 64.

§ 2. The second kind of fraud above, apparent from the intrinsic nature of the contract itself, is mainly on account of the inadequacy of the consideration; see Consideration, Ch. 1, a. 8 to a. 50, and especially a. 7, s. 37. It is well settled that mere inadequacy of consideration is not alone sufficient to invalidate the contract, unless very gross or great and manifest to common capacities; 1 Bro. C. C. 9; New. 359; and then as it may prove fraud, mistake, misapprehension or undue influence; for if a man of a sound mind, well informed in the case, under no undue influence, and at his entire liberty to act for his own interest, will sell a thing for half or a quarter the value of it, equity cannot aid him, suspend, set aside, or rescind his contract, 6 Ves. 274; 2 Salk. 449, *Thornhill v. Evans*; 1 Vern. 467, *Bell v. Price*; 2 Atk. 335; 1 Ch. 6, a. 276. Several of these and like cases are frauds in mortgages, (see Ch. 112,) in which the creditor by undue influence in taking the advantage of the debtor's necessities obtains in the contract, conditions in the nature of penalties, as five per cent. interest if he do not pay the four per cent. (the contract interest) punctually, and some say, if he contract for five and to take four punctually paid; but clearly this last position may be questioned, as it often has been. For when the creditor contracts for five, he contracts for just what the law (in England) allows, and his contract is unquestionably valid, then if he chooses to be liberal on punctual payment and to secure it, his just right, and to guard against debtor's negligence, to give up a part of his legal right, it is inconceivable how this can be objected to in law or equity. As the law has fixed five per cent. the best debtor has no legal claim to less. Also several cases to cover and conceal usury, see Ch. 153; many cases of sell-

ing goods &c. at high prices to the borrower, when a loan only was the real object. Where goods worth £1000, or sold in shops a little more, were sold to a young necessitous borrower, and his note taken for £2224, he was relieved in equity on paying the £1000, the amount he sold them for, and interest thereon, and his note was discharged. Equity holding also, that the lender did understand how the borrower would sell them in all probability in the lump. In various other ways the inadequacy of the consideration will appear in equity to be the effect of fraud, imposition, undue influence, duress, overreaching, or of mistake, misapprehension, or some other circumstance, evidence of fraud or of mistake. It is obvious, that in each case old age alone is not a sufficient ground to presume imposition, inadequacy of price or consideration must be a matter of calculation and judgment, depending on its circumstances, and so the evidence of the accompanying fraud, imposition, undue influence, mistake, &c. See several cases on this head, Eq. Ca. Abr. 478 to 483; also Newland on Contracts.

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The renewal of a lease obtained by the lessee for an inadequate consideration, set aside on terms submitted to by the answer. And a fraud in the delivery of a lease executed *bonâ fide*, affects it as much as if used in obtaining the execution, delivery making it a lease. And a manufacturer must account who obtains by collusion an unfair price. As to inadequacy, see Barret v. Gomeserra, Bunb. 94; Lowther v. Lowther, 13 Ves. jr. 95; Western v. Russel, 3 Ves. & Beam. 187; Butler v. Haskell, 4 Desaus. Ch. R. 687.

1 Vesey jr, 286, Lord Abington v. Butler 289, 290.—Ch. 226, a. 2.

§ 3. *The third kind of fraud above*, arising from the circumstances and condition of the contracting parties. This consists mainly in the advantage taken by one party of the weakness of mind or of the necessities of the other, putting him under the power of the former, see Osmond v. Fitzroy, 2 Vesey 408; 8 Vesey 65. The case of Bennet v. Wade is a very strong case, cited in sundry books. So Fane's case; the maker of the deed was very sick, and his mind very weak, though legally *compos*, and he died in two hours after executing it. Set aside merely because the maker of the deed could not have a mind adequate to the business he was about, and so might the more easily be imposed on, and though it contained a power of revocation.

2 Atk. 324, Bennett v. Wade.—6 Bro. P. C. 137.—Ch. 32, a. 12, s. 8, Fane's case.—1 P. W. 130.—4 Munf. 313.

But equity does not set a deed aside merely because the maker of it is drunk at the time; otherwise, if any advantage is taken of his situation, or if brought into it by the other party. 1 Vesey 19, Cory v. Cory; 1 Ch. Ca. 202, Rich v. Sydenham.

3 P. W. 130, in a note, Johnson v. Middlecott.

CH. 32. *His necessities.* Generally it is not sufficient to invalidate a contract that he who makes it is a distressed man, there must

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1 Vern. 237,
239, *Ard-
glasse v. Mus-
champ*,
Same v. Pitt.
1 Atk. 409,
Nichols v.
Nichols.—2
Vesey 635.—
New. on Con.
368.

be also an inadequacy of price, or some contrivance, deception, art or cunning used, proving altogether an unfair and fraudulent advantage was taken of his situation at the time of the contract, in order that equity may relieve. 4 Bro. P. C. 198, 222. A man may legally make a contract in jail, but it must be having proper assistance and advice, and in a fair manner. And even courts of law will set aside powers of attorney, signed by one in jail, if there be not an attorney attending on his part of his own procuring, employed by himself, and not procured by the person taking the warrant of attorney.

§ 4. *The fourth kind of frauds above*, is collected from the nature and circumstances of the transaction, as being an imposition on third persons not parties to the contract, usually creditors, purchasers, and parties in articles of marriage. As to articles of marriage hitherto they have been of too little use in the United States, and probably for some time will be, to deserve much notice at present; and so differently situated are parties in England, that such English articles have but little application here, especially as the English policy to build up or to preserve families and family distinctions, estates tail, estates to the eldest son, &c. enters deeply into such articles there, but not here.

§ 5. As to creditors and purchasers the two countries do not differ materially in their principles or practice. The cases are numerous in law and equity in which contracts are set aside, rescinded, or held void, because fraudulent, made to wrong purchasers and especially creditors. Such cases arise under various heads which respect contracts; but more especially in cases of agreements on the statutes of fraud, as Ch. 11; of Bankruptcies Ch. 18; Ch. 39 of Insolvencies; various parts of this chapter; in cases of Insurance, Ch. 40; of Evidence, Ch. 80, &c.; cases of Rescinding Contracts, Chs. 169, 122 and 139; Ch. 225, 226, Matters in Equity. To all which may here be added a few late cases.

§ 6. *As to creditors.* Observing that in regard to frauds affecting contracts, I have but occasionally made law and equity distinct parts of this work, because it will be found as to them in a majority of cases law and equity have a concurrent jurisdiction, and as to very many which equity ought to set aside, the law ought not to carry into effect;—hence of the same final result, though in different ways; and hence cases decided in equity are often found under legal heads, and *vice versa*, as far as contracts are deemed void, for fraud or imposition &c. especially as to creditors and purchasers.

In regard to creditors the 13 El. is material ; in force here as principles of our common law, cited at large Ch. 109, a. 9, (also 27 El.) These acts being in suppression of fraud are construed liberally, *Twyne's case*, ante. The consideration must be good and the contract *bonâ fide*, both are essential. *Id.* ; *Edwards v. Harben* was at law, see ante a. 1, s. 16, a. 3, *Bamford v. Baron*, id. a. 1, s. 17. One may mortgage land and remain in possession and no evidence of fraud, *New. on Con. 72* ; otherwise if his deed be absolute. So if one convey his lands to pay his debts, yet keeps the conveyance, this is fraudulent, 2 Vern. 510 ; as it gives him the election to set it up or not, as it may suit his purpose ; see *Cadogan v. Kennet*, table of cases as to goods not delivered &c., *Haselington v. Gill*, Ch. 19, a. 1, s. 2, *Jarman v. Woolloton*, id. To these cases, as to the wife's separate goods add, the deed may be fraudulent if the consideration be grossly inadequate, or the wife permit third persons to treat the property in question as the husband's ; this may be evidence, the assignment to her was made to defraud creditors.

§ 7. *Grantor's possession, no fraud, &c.* When one absolutely sells land or goods, as on the face of his deed, or mortgages goods ; and yet remains in possession as owner, the possession is inconsistent with the deed, and fraud is presumed : but the presumption may be repelled, 1. If the modified interest of the vendor under the deed, makes it consistent with it, he keeps possession : 2. If such possession necessarily arise out of the nature of the transaction between the parties, and they have in view an honest purpose. As where the supercargo of a ship, going on a voyage, made a bill of sale of the goods he had on board her, and of the produce thereof, to be made as security to repay monies lent by the vendee ; held valid in a suit in equity between him and the vendor's creditor ; as the trust of those goods appeared on the face of the bill of sale ; the vendor being trusted by the vendee, to sell them to his advantage. It will be observed the trust appeared in the instrument of sale itself, and this appears essential in several other cases. This is the principle of every bottomry, where the mortgagor of the ship or goods, remains in possession for the voyage.

So if A's goods are seized on *scire facias*, and sold to B, *bonâ fide*, for a valuable consideration ; and B allows A to retain the goods in his possession, on condition he pays B the money as he shall raise it, *by the sale of the goods*, this is valid, and not fraudulent : like principle, *Bul. N. P. 258* ; 1 Raym. 286. So where A's goods were taken on execution, B, his brother-in-law, *but no creditor*, bought them under a bill of sale, and permitted A to continue in possession, *in order that he might be able to carry on his business*. A afterwards made a bill of sale to the debt.,

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Stone v.
Grubham.
Tarback v.
Marbury.

10 Ves. 150.
—6 East 257,
Dewley v.
Baynton.

New. on Con.
374.—Pr. Ch.
285, *Bucknal*
v. Roiston.

1 Raym. 724.
Cole v. Davies.—4 Dall.
208.—2 Bos.
& P. 59, 60,
Kidd v. Raw-
linson.

CH. 32. who took possession. Held, B's title was good. The goods
 Art. 13. were put up to sale, and the sheriff gave the bill of sale : the
 jury in this case were directed to inquire, "if B had purchased
 the goods with a view to defeat any execution, by any creditors of A." See also *Barrow v. Paxton*, Ch. 32, a. 4, s. 7. Also *Lady Lambert's case*. Shep. Touch. 67; *Stone v. Grubham*, *Cadogan v. Kennet*, and *Haselington v. Gill*, above. These are all the cases in which possession has been retained by the vendor after conveyance, and that held good against creditors and subsequent purchasers, as affirmed in a note, 2 Bos. & P. 60. On the other side, see not only *Edwards v. Harben*; *Bamford v. Baron*; *Hamilton v. Russell*, &c. above : but also *Paget v. Perchard*, 1 Esp. 205; *Wordall v. Smith*, 1 Camp. 333, and *Rice v. Sargent*, and several cases cited in this; *Ryall v. Roll*, a. 1, s. 11.

1 Atk. 167,
Ryall v. Roll.

§ 8. A assigns goods to B, *with condition*, he is not to take possession till forfeited. This is fraudulent, as here is no modified interest in B, or any special purpose, as above, for A's continued possession; such a possession is not consistent with the deed. And *Burnet J.* in 1 Atk. 167, referring to *Ryall v. Roll*, a. 1, s. 11, said, "there is no distinction whether the sale be *absolute* or *conditional*. Courts of equity and juries are to consider upon the whole evidence, whether the conveyance was made with a view to defraud or not." As to goods, possession is viewed as evidence of ownership; not so as to lands; *New. on Con.* 377. The mortgagee of goods is viewed as the true owner, and ought to have actual possession; but then an exception, as of goods at sea &c. See the cases *Brown v. Strathcote*, Ch. 44, a. 3, s. 6; *Rolleston v. Hibbert*, Ch. 44, a. 3, s. 7; *Gardner v. Dutch*, Ch. 171, a. 1, s. 15; *Bourne v. Dodson*, 1 Atk. 153, 157; 2 Vesey 272; *Atkinson v. Maling*, Ch. 32, a. 3, s. 3. A bond assigned must be delivered, except legally held by a third person, 1 Atk. 176; 1 Bro. C. C. 125. But book debts assigned, notice is enough, as they cannot be delivered; 1 Atk. 176; nor can fixtures be; 1 Atk. 172.

§ 9. *A debtor may prefer one or more creditors.* See the cases, English, and American. *Insolvency*, Ch. 39, *Estwick v. Cailland*. Ch. 32, a. 1, s. 34, and 8 D. & E. 528; 5 D. & E. 528; 5 D. & E. 238; *Holdberd v. Anderson*, Ch. 32, a. 1, s. 27; 4 East 1; 1 Burr. 478, 481; *Linto v. Bartlett*, Ch. 32, a. 1, s. 33; *Divon v. Watts*, a. 1; *Hague v. Roleston* Ch. 168, a. 1, s. 5; *Harmon v. Fisher*, Ch. 32, a. 1, s. 33; *Cowp.* 629; See number 10 &c.

6 Ves. 387.—
 Gilb. R. 37.

§ 10. *One insolvent cannot make voluntary conveyances, or*
New. on Con. 384, 385, 386.—3 Co. 81.—4 Cruise 398, *Lush v. Wilkinson*.—*Stileman v. Ashdown*, 2 Atk. 477.—*Walker v. Burrows*, 1 Atk. 98.—*Fryer v. Flood*, 1 Bro. C. C. 160.—8 Ves. jr. 195, 200.—*Crisp v. Pratt*, Cro. Car. 548, 551.—*Lilly v. Osborne*, 3 P. W. 298. Buying in trust for the insolvent's family, 2 Ch. Ca. 26.—1 P. W. 608; same as a voluntary settlement, 2 Vern. 67, 120, *Bush v. Andrews*, id. 683.—*Fletcher v. Sidley*, 2 Vern. 400.—*Proctor v. Warren*, See Ch. Ca. 78.—2 Ves. 11, *Townsend v. Wyndham*.—1 Vent. 194.—1 Atk.

settlement, that is for love and affection. There are many cases to these points, English and American. As 1 Vesey 27; 2 Vesey 11; Amb. 121, Parker v. Proctor &c. ante; reasoning in Cadogan v. Kennett 5 Vesey 387; New. on Con. 383, 390, 387. On the 13th El. it must be proved the person making a voluntary conveyance, was indebted *at the time*, and so as not to leave enough to pay all his debts, or to make himself *insolvent*; 1 Atk. 93; 2 Bro. C. C. 90; 5 Vesey 384. It is well observed that every man must be *indebted* more or less, even if he pays his bills weekly. Hence the word indebted in the 13th El. must mean something more; and what better rule can there be, than a *voluntary* conveyance to a wife or child, which leaves the debtor, making it *insolvent*, that is, unable to pay his creditors; as then, he must make his voluntary conveyance, knowing all this; so with intent to defraud or delay them. If not indebted, natural love and affection *alone*, is a good consideration against creditors. This must mean when he remains clearly able to pay them, as then there is no fraud, no *mala fides*. The true principle is laid down by lord Hardwicke, who said, "if there be a *voluntary* conveyance of real estate or chattel interest, by one not indebted at the time, though he afterwards becomes indebted, if that conveyance was for a child, and no particular evidence or badge of fraud, to deceive or defraud subsequent creditors, that will be good; but if any marks of fraud, collusion, or intent to deceive subsequent creditors appear, that will make it void." The same principles hold, as to after purchasers, and all acts for the suppression of fraud must be liberally construed; and though the grantor be not in debt, yet if he conveys *evidently to cheat subsequent creditors or purchasers and so to defraud them*, his case must be within these statutes 13 & 27 El.; but not every voluntary settlement, conveyance, or gift, even by one in debt, can be void, as the richest man must always owe some debts—small family bills, at least. Therefore, it was held in Lush v. Wilkinson, necessary to impeach a settlement on the wife after marriage, under 13 El. the husband must be proved to have been indebted at the time, and to the extent of *insolvency*. "It must depend on this whether he was in *solvent* circumstances at the time." Held a voluntary settlement valid, all the creditors, at the time it was made, being satisfied. The bankrupt laws out of the case, "a debtor may assign all his effects for the benefit of particular creditors," per Lord Kenyon. He also said "I admit that if this were a *voluntary* deed, the law says it is fraudulent. It was for a valuable consideration, and not voluntary." And "courts will not weigh the consideration in very nice scales, if it be an honest transaction;" "very small consider-

CH. 32.

Art. 13.

115.—2 Atk.
493.—2 Vern.
211.—2 Br.
C. C. 90, 148.
—5 Vesey jr.
384, Lush v.
Wilkinson.—
8 Ves. jr. 199.
—1 Ves. jr.
148.—3 Br.
C. C. 627.—
4 Id. 270.—
4 Dall. 304,
306.—4 East
207.—8 D. &
E. 521, 531,
Nunn & al.
assignees, v.
Wilsmore,
exr.—Salk.
111, 421.—
Skin. 555.—
1 Atk. 275.—
3 Ves. 478.—
2 Vern. 284.
—Amb. 312.

CH. 32.
Art. 13.



New. on Con.
389—2 Atk.
601.—1 Ch
R. 69.—2
Vern. 261,
Hungerford
v. Earle.

ations have been holden sufficient to give validity to a deed," where fair and honest, &c. 1 Ch. Ca. 105; 2 Lev. 105; 2 Wils. 356, 358, *Roe v. Milton*; 2 P. W. 245, 255, *Johnson v. Legard*; Sugden 469, *Fairfield v. Birch*, id.

§ 11. *Deeds avoided by the 13 Eliz., are also void against after creditors.* This position must be viewed in connexion with the last, that is, the debtor must be insolvent; then perhaps a voluntary conveyance may be deemed to have respect to them, and made with an intent to defraud them. But suppose before they become creditors, he becomes rich, and is so when they trust him; but before he pays them he is again insolvent; can they possibly have recourse to the first insolvency? According to our decisions, one becoming a creditor after the voluntary conveyance is made and known, has no right to complain of it. See *Adams v. Adams*, *Parker v. Proctor*, &c. above. And these are the best decisions. There may however be an exception, as where the deed is unrecorded and unknown to him, or actually made with a design to affect after creditors. The 13 El. extends also to forfeitures.

New. on Con.
391 to 408—
2 Eq. Ca.
Abr. 677 to
689.—Gran-
ville Lib. 10, c.
8.—4 Desaus.
Ch. R. 264,
Pledger v.
Davis, admr.

§ 12. *Contracts in fraud of purchasers*, 27 El. ch. 4. recited at large, Ch. 109, and there explained in part; as also our own statutes of the same kind. See *Doe v. Routledge*; *Newstead v. Searle*; *Twyne's case*, as it shows how 27 El. varied the common law, as to an after purchaser. By that law, as to him, a *fraudulent* deed was valid; as when it was made, it was no injury or fraud to him. *Gooche's case*, and sundry others, English and American; and the result thereof there stated. In applying the 27 El. it will be observed, that that act was passed, when scarcely any deeds were recorded: hence, might start up at any time to overreach fair purchasers for valuable consideration. But as nearly all our American deeds are recorded, an after purchaser cannot be deceived in regard to real estate. A part of this act has never been practised upon in the United States, that part which works a forfeiture of a year's value, and six months imprisonment. Nor does the act affect any conveyance made *bonâ fide*, and for a good consideration. The great question is, *when is a voluntary conveyance void against a subsequent purchaser, for a valuable consideration?* By the English authorities, *every such conveyance is*, though he has notice of it. It has been held that the words in this act, *other good consideration*, mean *valuable consideration*, and this must mean, as said in *Doe v. Routledge*, a *real adequate* consideration, or the act is all nonsense; for otherwise a family settlement, fairly made by a rich man, not in debt, might be overturned by an after conveyance, even for love and affection, or for a single dollar.

New. on Con.
393, 398—
3 Co. 83,
Brown v.
Jones.—1
Atk. 188.

But when it is said that by English cases, every *voluntary* conveyance is void against an after purchaser, though *he have notice of it*; it is to be observed that several conveyances called *voluntary* were in fact for valuable considerations, in other family provisions &c.; as 1 Ch. Ca. 99, *Douglass v. Waad* & al. and so valid. The cases cited to prove the general position, are Cro. J. 158; Pr. Ch. 13; 1 Atk. 264; *Townsend v. Windham*, above; 2 Vesey 10; Sid. 133; 1 Ch. Ca. 216; 5 Co. 60, 61; 1 Eq. Ca. Abr. 334; 2 Bro. C. C. 148.

Newland (398) affirms, he can find no case in which any but a *valuable* consideration will support a conveyance, against a purchaser for a valuable consideration; but admits cases appear the other way, but thinks they were decided on *different* grounds; as 1 Vern. 467. The debt. purchased with notice of the lease, and took collateral security; 1 Lev. 150, 237, *Jenkins v. Keymis*, was a consideration paid. *Newstead v. Searles*, see Ch. 109, a. 9, *Doe v. Routledge*, id. So 2 Wils. 356, *Hamerton v. Mitton*, was also such consideration. 1 Mod. 119, and sundry cases there cited. And the valuable consideration may arise after the voluntary deed is made, 1 Sid. 133; 3 Lev. 887, as by the marriage being had, or by a second conveyance; as if A *fraudulently* convey to B, and B, for a valuable consideration, convey to C, and A convey (having entered) to D, for a valuable consideration; C shall hold the estate. See also *Sutton v. Lord*, a. 2, s. 2, and *Goodale v. Nichols*, a. 2, s. 1; same principle, *Kirk v. Clark*, Pr. Ch. 275, as to power of revocation.

So a *boná fide* purchaser, for a valuable consideration, prevails against one by contract, in equity, if there be no notice of the previous contract to sell, and before it is executed, and such *boná fide* purchaser will hold the estate. It is not settled how far the consideration of *marriage* extends in a settlement, if to *collaterals*.

§ 13. *One party signs and the other accepts, how binding.* A contract is, by the statute of frauds, required to be in writing, and acts are to be done by both parties; and he, who is to perform a principal part, signs, and the other accepts—the contract binds both.

§ 14. *Parol promise to make good, short measures of land, is void.* As where a piece of land was sold, supposed to contain sixty acres, and described by metes and bounds in the deed; and a parol promise at the time of the sale was made, that the seller would satisfy the purchaser for any deficiency, short of sixty acres. Held void by the statute.

§ 15. *A parol contract in part executed, will be carried in to effect, though for the sale of lands.* As by the purchaser's

CH. 32.
Art. 13.



Oxley v. Lee,
2 Desaus.
Ch. R. 269.—
1 Ch. R. 275.
—2 Lev. 105.
—1 Atk. 266.
—1 Vent.
193, *Bradish*
v. Gibbs.—3
Johns. Ch. R.
550.—4 Hen.
& Mun. 486,
Greenhow v.
Coults.—See
18 Ves. jr. 92.
—1 Ch. Ca.
106.—9 Johns.
R. 450, *Waters v. Travis*.
—18 Ves. 84.

2 Caines' R.
120, *Roget v.*
Merritt & al.

Kirby 23,
Bradley v.
Blodget.

2 Day's Ca.
225, *Downey*
v. Hotchkiss.

CH. 32.

Art. 13.

1 Caines' R.
45.—9 Johns.
R. 337, 344,
Sturtevant v.
Ballard.—3
Caines' R.
182.—2
Caines' Ca.
in E. 301.

paying part of the purchase money, and making repairs—
Enough it appear in evidence the contract was in writing.

§ 16. A voluntary sale of goods, with an agreement in the deed, or out of it, that the vendor may keep possession, is void as against creditors, except in special cases, and for special reasons, to be shown and approved by the court. A, by a regular bill of sale sold to B, August 29, 1810, certain articles, the tools of his trade, for a sum of money B paid A, and A was to use them three months; C got judgment against A, August 2, 1810, and took out a *scire facias* and delivered it to the officer, Nov. 28, 1810, who seized said articles, then in A's actual possession, and sold them to satisfy C's execution. Held, the sale to B, not accompanied with actual delivery, was fraudulent and void as against C, a judgment creditor. A shewed the tools as his to the officer.

§ 17. *Evidence of fraud or not.* There is none if A mortgage his land, and then contract to convey it to me free of incumbrance &c. in four years, on my paying him a sum named, though he do not mention the mortgage, because he may discharge the mortgage in time so to convey; decided in *assumpsit* for money had and received to recover back the monies paid A, being but a part of said sum; 9 Johns. R. 126, 127, *Greenby v. Cheevers*.

§ 18. *Nor is there any evidence of fraud* where a person fairly buys the debtor's property, where an execution against him has long slept in the officer's hands. As where in New York a *fi. fa.* issued April 14, 1810, against A and delivered to the sheriff, and in April 1811, B bought a cow of A, *bonâ fide*, without any intent to defeat the execution, which lay dormant in the officer's hands till May 25, 1811, when he seized and sold the cow. Held, as there was no evidence of an actual levy on the goods of A, the sale of the cow to B was valid, and not rendered fraudulent by the execution. This case tends to prove the execution is not a fixed *lien* on the debtor's personal estate till actually seized &c.

§ 19. Error to the Circuit Court in the District of Columbia setting in Alexandria, under Virginia law; and held, that if a magistrate has received a deed of trust from an insolvent debtor, and this deed was fraudulent in law as to creditors, the magistrate cannot sit in the discharge of this debtor, and when it is so obtained, it is void. Decided on a state of facts in the nature of a special verdict agreed on by the parties; 5 Cranch 363, 368, *Slacum v. Simms & al.*

§ 20. The statute of Virginia requires only that the promise be in writing; but the English statute requires that the agreement be in writing, 5 Cranch 142, 154, *Violett v. Patton*; see *Agreement*. An action by the endorsee against the endor-

ser of a note made by one Brooks who was insolvent ; the endorsement was made on a blank piece of paper ; see *Sumner v. Parsons*, *Russel v. Langstaff*, *Pillans & Rose v. Van Merop & al.*, *Collins v. Emmett*, in other chapters. The endorsement was viewed as a letter of credit to Brooks. By the Virginia act the maker of a note, if solvent, must be sued before recourse is had to the endorser, and if the maker be insolvent, the jury decides if a suit against him would produce the money ; *Lee v. Love*, 1 Call 497 ; *Johnson v. Ronald*, 4 Munford 77, as to the word *promise &c.*

CH. 33.
Art. 1.

§ 21. *The rule, caveat emptor, in equity*, though it holds as to visible defects in property, it does not as to the fraudulent concealment of them by the vendor, *Sugden's Vendors &c.* 221, 230, and cases cited. The purchaser must notice the quality of the land or a way over it ; *Oldfield v. Round*, 5 Ves. jr. 508, 509. As to defective description, *Calverly v. Williams*, 1 Ves. jr. 210, 213 ; *Shirley v. Davies*, 6 Ves. jr. 678. False or fraudulent descriptions by the vendor, the purchaser may in law and equity rescind the contract ; *Fenton v. Brown*, 14 Ves. jr. 144 ; *Grant v. Munt*, Coop. 175 ; not if he knew it was false ; *Dyer v. Hargrave*, 10 Ves. jr. 505 ; *Mayo v. Purul*, 3 Munf. 243.

CHAPTER XXXIII.

ACTION OF ASSUMPSIT. FREIGHT.

ART. 1. *General principles.*

§ 1. Though freight is often secured by covenant or charter-party, and is recovered in action of covenant, yet often also it is recovered in *assumpsit*, either *indebitatus assumpsit* or *quantum meruit*. It is first material to consider what freight is, and when due. As the cases may be very numerous, and the principles on which they all rest are but few and plain, the subject will be best understood by attending to the principles on which freight becomes due and is recoverable. The safety of the ship is the mother of freight, "and where no freight is earned by the ship, the mariners have no title to wages."

See Charter-party, Ch. 103.—Imp. M. P. 276, 281.—1 Vent. 100.—1 Esp. 113.

1 Esp. 113.

Freight is the hire of a ship, or part of one, for conveying goods from one port to another ; or is the sum agreed on by the owner and the merchant for the use of the vessel, and is a *lien* on the goods. On a general principle an owner of a

Insurance on Freight, see Ch. 40, a. 16.

CH. 33. vessel has an action of *assumpsit* against any person who
 Art. 1. (without deed) uses her, or transports his goods in her : but
 the general principle is controlled in some cases by certain
 established rules. These are :

Imp. M. P.
 279, 280.

First. If a merchant hires a ship, and do not fully load her, without his consent the master cannot take in other goods, without accounting to him for the freight.

§ 2. Second. Though the merchant do not load the full quantity of goods agreed on, yet he shall pay the whole freight ; and if he load more, yet he shall pay for the excess.

§ 3. Third. If a time be appointed, and either the ship be not ready to take in, or the merchant to put on board, the parties are at liberty and have a remedy by action for the detriment.

§ 4. Fourth. If a part be on board, and some misfortune prevent the merchant sending the whole in time, the master may contract with another and have freight, as damages for the time they were on board longer than limited. On the other hand, if the vessel be not ready, the merchant may ship the remainder of his goods on board another vessel, and recover damages against the master for the rest.

§ 5. Fifth. If a ship be freighted out and in, (or out and home) there is no freight due till the whole voyage is performed, if therefore the ship perish coming home, the whole freight is lost ; so if captured, unless due from the captors &c.

§ 6. Sixth. The master shall take no freight for any goods lost by shipwreck, plundered by pirates, or taken by the enemy, unless the ship and goods be redeemed. In which case he shall be paid his freight to the place where he was taken, upon contributing to the redemption.

§ 7. Seventh. The master shall be paid his freight for the goods saved from shipwreck, and in case he cannot get a vessel to carry them to the place where they were bound, he shall be paid in proportion to the part of the voyage already gone ; this must mean if the merchant receive his goods. And if the master have another ship ready to carry the goods to their place of destination, and the owner of them takes them himself, yet the master shall have his full freight, for then the master is ready to do as the circumstances require.

Abbot 196,
 200.

4 Mass. R.
 672, Pearce
 v. Phillips.

The plt. carried money for the deft. to India, on half profits, in lieu of freight and commissions. Part of the goods were lost. There was a profit on the part not lost, and no profit on the whole taken together. The court decided that the ship owner was not entitled to any of the profits on the goods not lost, as the whole adventure was to be considered.

4 Mass. R.
 692, 702, Gil-
 christ v.
 Ward.

In this case it appeared that specie was shipped on a voyage from the United States to Sumatra, and back to Europe, the owners of the ship to have half profits in lieu of freight ; at Sumatra the property of the owners and shipper was invested in

a cargo for Europe and there sold, and there the supercargo caused them to be credited with their respective proportions of the proceeds. The share of the owners was duly remitted to them with half the profits on the adventure of the shipper, who having directed a particular appropriation of his share, the same remained in a merchant's hands, by whose failure a loss accrued thereon. This was the shipper's loss, of which the ship owners were not liable to bear any part.

CH. 38.
Art. 1.

In this case also A hired one fourth of a vessel for a voyage at a certain sum per month. In the voyage she was wrecked, and the cargo was transported to the agreed port of delivery. Held, the owner shall receive the hire as if the voyage had been performed, deducting the expenses of transporting the goods from the wreck to this port; held also, A must pay his fourth part of this transportation from the wreck to the port of delivery: held 3. A, the freighter, paid none of the expense of landing his goods at the place of wreck, (Eastham,) but this fell on the freight, but was considered as receiving his goods after there landed. In fact, as the owner of the vessel delivered A's goods at their destined port, (Biddeford,) A paid full freight. The expense by land from Eastham to Biddeford was deducted out of the whole freight; this expense he paid.

5 Mass. R.
252, 257, Cof-
fin v. Storer.

Further rules laid down by Lord Mansfield and the court.

§ 8. Eighth. If a freighted ship become accidentally disabled on her voyage, without the fault of the master, he has his option of two things, either to refit his vessel, if he can in convenient time, or to hire another to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the whole freight for the full voyage; and if he "hire another ship to complete the voyage," "he shall have his freight of the goods to be reckoned, according to their proportion to the whole cargo, and the goods shall pay the costs of their salvage." It seems to follow from this rule, that if the master will not do so where he can, and carry the goods to the port of delivery, he shall lose all his freight.

2 Burr. 882,
890, Luke &
al. v. Lyde.—
1 W. Bl. 190.
—Abbot 194,
200.—Doug.
272.

§ 9. Ninth. "As to the value of the goods it is nothing to the master of the ship, whether the goods are spoiled or not, provided the freighter takes them. It is enough the master has carried them; for by so doing he has earned his freight, and the merchant shall be obliged to take all or none; he shall not take some and abandon the rest." "If he abandon all, he is excused the freight, and he may abandon all, though they are not all lost."

These rules, eight and nine, were laid down in this case, viz: the deft., Lyde, shipped 1501 quintals of fish in the Sarah from Newfoundland to Lisbon, at 2s. freight a quintal.

CH. 33.
Art. 1.



Fish cost at Newfoundland 10s. 6d.; the plts. shipped 945 quintals; this and the ship they insured, but not the freight on the 1501 quintals. Nov. 27, 1756, she sailed from St. Johns, and had been on her voyage seventeen days, when, Dec. 14, she was taken by a French ship within four days' sail of Lisbon. The captain, officers, and crew (except one man and a boy) were put on board the French ship. Dec. 17, the Sarah was retaken by a British ship, and Dec. 29, carried into Biddeford, in England; there the plts. abandoned the ship and the 945 quintals. The deft. had his fish of the recaptors, and paid them 5s. a quintal, salvage, at the rate of one half. The fish could not be sold in England for more than 10s. a quintal. Bilboa was deemed the best market; there the deft. sent his fish without delay, and there sold it at 5s. 6d. a quintal, clear of freight there, and all expenses attending the sale there. The freight from Biddeford to Lisbon was higher than from Newfoundland to Lisbon. All the distance from the place of capture to Biddeford was out of the ship's course.

Judgment for the plts. for freight on the half saved, for the part of the voyage performed before the capture; that is, computing the voyage at twenty-one days, freight was allowed for seventeen.

The court added, that there was a capture without the master's fault, and a recapture, the deft. did not abandon, but took his goods, and did not require the master to carry them to Lisbon. Some freight then is due, for the freighter received his goods. This was computed as above. The salvage, one half, was considered the same as if half the goods had been lost. Abbot 201, has the same idea, that the expenses paid for saving the goods must be viewed as so much of them lost; hence, if a bale of goods sell for \$100, and \$75 have been paid for the expenses of saving them, three quarters of them must be considered as lost. So in the Sarah's case, 5s. a quintal on the fish, half the value having been paid as *salvage*, half was viewed as lost, and freight allowed on the other half *pro ratâ itineris*. In Coffin v. Storer our court said, this rule adopted in Luke v. Lyde "is manifestly unjust."

§ 10. Tenth rule. If a master state that his ship shall take in a certain lading, and he take in more, especially of other men, he shall lose all his freight. And in such case, if goods be cast overboard in a storm, the master shall bear the loss, and there shall be no contribution or average.

§ 11. Eleventh. If a ship freighted for one port enter into another by reason of storms, or some force against the master's will, the goods shall be transported to the port of delivery at his charge. And if one compel the master to overload his ship, he is liable to make the master whole.

§ 12. Twelfth. If a merchant freight a ship with all her furniture by the month, he to man and victual her, and contract with the owner to pay him for the use of the ship and furniture £20 every month, at her return to the Thames; and after being abroad about two years she is lost in coming home, the master shall have his freight at the time of the loss, for the money is due monthly. Quære, as to a part of a month.

CH. 33.
Art. 1.

§ 13. After the mortgage of a ship the mortgagee cannot have *assumpsit* for the freight till he takes possession; for the mortgager while he retains possession is owner as to all the world; he bears the expenses and is to reap the profits; nor does *assumpsit* lie against the mortgagee for necessities provided for her before he takes possession. See Mortgages, Ch. 112.

1 H. Bl. 117.
—Imp. M. P. 281, Chennery v. Blackburne.—1 H. Bl. 117, 120, Jackson v. Vernon.

§ 14. Freight to a neutral master, on enemy's goods, can be settled only in the admiralty; for it is connected with the prize question, as whether he has forfeited it by having contraband goods &c., &c. Hence *assumpsit* does not lie for such master to recover freight on such goods. But he must sue in the admiralty, and found his claim on national law.

3 T. R. 323, 348, Smart v. Wolf.

§ 15. The master may retain the goods, shipped on board his vessel, till he is paid his freight; but if he parts with the possession of them, he must then resort to his contract. And he may plead his lien, or give it in evidence. See Ch. 44.

Imp. M. P. 281.—Douglass. 104.—12 Mod. 511.—2 Dallas 182. Mal. Lex Mer. 98.—Douglass. 541.—1 Sid. 236.

§ 16. If a ship be freighted so much out and so much home, the outward freight shall be paid, though she perish in returning home; and when the ship is lost, the whole freight, from the last place of payment, is lost, except as 8th and 9th.

§ 17. If the master sail in a tempest, without a pilot, or necessities, or contrary to contract, he cannot demand freight; his claim to it is forfeited by his misconduct.

Mal. Lex Mer. 98, 102.—3 Bac. Abr. 597.

§ 18. The plts. took on board of their vessel two horses of the debt., to be carried from New Haven to Trinidad, for a freight of \$70 each. Having been out 13 days, and being within 2 day's sail of Trinidad, the vessel, without any fault of her master &c., was captured by a French privateer, Dec. 1799, and ordered for Guadaloupe. Three days after she was recaptured by the English, and carried into Martinico. The said horses were ransomed at one third of their value. This, Pinto, the debt., paid, and received the horses in good order, and made no objection, and sold them for \$420, a good price, and before the plts. had a reasonable time to proceed on the voyage to Trinidad. For Pinto accepted the horses at Martinico, sold them well, and did not request them to be carried to Trinidad. The court held, that Pinto was liable to pay $\frac{1}{3}$ of the freight, so much of the passage having been performed, after deducting the salvage. Cases cited, 1 Brown

Atwater & al. v. Pinto, Sup. Court of Errors in Connecticut.

CH. 33. 121; 7 T. R. 381; Molloy 371; 2 Burr. 882, 883; Abbot
Art. 2. 233, 244, 258; 2 Johns. R. 323, 327.



Freight, Insurance on, see Ch. 40, a. 16, and charter-party for, Ch. 103.

10 East 526,
Liddard v.
Lopes.

§ 19. The plt., by agreement, let his ship to the defts., to freight on a voyage from Shields to Lisbon. It was prevented by the enemy's taking possession of Lisbon, after the ship entered on the voyage. Held, no freight due *pro rata*. Freighters refused to receive the goods at Portsmouth.

Mass. Sup.
Jud. Court,
Essex Nov.
Term 1795,
Richards v.
Searle & Ty-
ler.

ART. 2. *Several further cases, English and American.*

§ 1. The contract was for a voyage from Newburyport to one or more of the West India islands, and back to Newburyport, at £22. 10s. freight a month, for each and every month from a certain date, to her return to Newburyport. She discharged her cargo in the West Indies, and was lost on her return home.

§ 2. The court allowed freight to the time of her loss on the special words in the contract, *each and every month*. But otherwise had it been freight so much per month, from such date to her return; no freight could be allowed, because then it would have been one entire contract, and that performed but in part by the owner. But no interest was allowed. This latter part of this case differs in the *wording* from the 12th rule above.

Mass. Colony
laws, A. D.
1672.

§ 3. Case decided. S shipped goods with B, to be delivered to R, beyond sea, he paying freight. B, on his arrival at the port, tendered the goods to R, and he refused to receive them, or pay the freight. B left the goods in safe hands, by good advice. It was decided that B could not recover the freight of S, but he ought to have taken it out of the goods, as the law gave him a lien upon them &c.

1 H. Bl. 117,
120, Jackson
v. Vernon.

§ 4. Freight does not belong to the mortgagee of a ship, till he has taken possession, nor till this is done is he liable for necessaries provided for her. As where, February 6, 1787, Palmer gave a bond of £1500 to the deft., and an absolute bill of sale of the ship repaired, and an assignment of certain goods. In this, it was recited that the bill of sale &c., were *absolute, and to secure the £1500*, and that the papers were so given to enable the deft. to sell the ship and goods, to raise money to pay the said £1500 so lent, and the interest. Also in the assignment, there was a covenant from the deft. to Palmer, that in case he paid the £1500 and interest before the ship and goods should be so sold, then the deft. should reconvey the ship and goods; but nothing to prevent the deft. selling the ship and goods before repaid.

The court decided, that the deft. was only *mortgagee*, not

liable for provisions, or entitled to freight, till he got possession; nor liable for repairs or necessaries. 8 Johns. R. 159.

CH. 33.
Art. 2.

§ 5. To make part owners liable on account of freight, for the neglect of their master, they must be joined in the action. As where several part owners placed a master in their ship for wages, which ship usually transported goods for hire, and J. S. delivered goods to the master, to be carried for hire, without any contract with the owners, and the goods were spoiled by the master's neglect. Held, the owners were liable in respect of their freight, and as employing the master. But then all the owners are liable as on contract. Either master or owners may sue for freight. As to joining them, see Ch. 42, a. 3.

2 Salk. 440,
Boson v.
Sanford.—1
Bac. Abr. 29.

§ 6. *Freight pro rata itineris*. In an action on a charter-party, the deft. covenanted to pay so much for freight, for "goods delivered at A." Held, freight cannot be recovered *pro rata itineris*, if the ship be wrecked at B, before her arrival at A, though the deft. accept the goods at B. But it is added, perhaps *assumpsit* on a *quantum meruit*, might have been maintained. *Assumpsit* lies, 2 Johns. R. 323, Robinson v. Mar. Ins. Com.

7 T. R. 381,
Cook v. Jennings, cited 3
Com. D. 247.

§ 7. In this case it was held, that if after capture and condemnation, the sentence be reversed and the goods be restored, "freight *pro rata itineris* is due," and so seamen's wages in proportion. Freight *pro rata &c.*, see Abbot 335 to 360.

Lex Mer.
Am. 190, Bail-
lie v. Moudig-
liani.

§ 8. *Assumpsit for freight*, of 72 hhds. of tobacco, from Virginia to Liverpool. September 1799, the plt., master of the ship Friendship, a general freighting ship, took this tobacco on board at Norfolk. The vessel was consigned to Rathbone and Co. at Liverpool by her owners. Edward and Thomas Downing, of Philadelphia, put on board this tobacco, to be delivered at Liverpool to Mr. Downing, or to his assigns, he or they paying freight; 6 guineas a hhd. The bills of lading were not endorsed, except the memorandum, substituting Downing's name in lieu of Felton's, by consent of parties. The vessel arrived near to Liverpool, and took a pilot, but solely by bad weather was driven on shore, and was considerably injured, and was in further danger, when the plt. applied to Rathbone & Co., his consignees; they notified the several consignees of goods on board, to meet, and among others Felton, whose name remained legible on the bill of lading. They met, and the deft. remarked that Downing & Co. were his correspondents, and agreed to assist in saving the goods, if any were consigned to him. Soon after the meeting he received an invoice of this tobacco, and a letter from E. and T. Downing, inclosing a bill of lading, in which was Downing's name only. This letter stated the tobacco was consigned to E. Downing, who meant to proceed to Liverpool, and directed

1 East 507,
Ward v. Fel-
ton.

CH. 33. an insurance on it, at £40 a hhd., and it requested the deft. to see to the sale of this tobacco, if E. Downing did not arrive in season. This was the first transaction between the Downings and the deft. November 18, 1799, E. Downing not having arrived, the deft. made an entry at the custom house of this tobacco, as was usual and legal. "In the Friendship, Virginia, G. Felton, 72 hhds., 105,881 lbs. tobacco, American produce, to be warehoused per ———, November 19, 1797." This tobacco was landed, and lodged in the king's warehouse accordingly. But some part had been lost in the storm, and the rest so damaged, that only 30 hhds. were good or saved. December 3, after E. Downing arrived at Liverpool, the freight was demanded of the deft. The 30 serviceable hhds. were worth but £5 a hhd., without any allowance for their freight; so, much less than the freight.

The court, on these facts, decided that the deft. was not liable to pay any part of the freight; for he acted for E. Downing, to whom the tobacco was consigned. The deft. made no contract to pay the freight. The plt. should have sued the shippers; and the plt. might have kept the goods till his lien was satisfied. A freighter agreed to pay £192, disbursements at the foreign port, and freight the voyage; the ship was lost in returning. Held, he could not recover back the £192, part of the hire, or in fact freight, for by the special contract, the charter-party, the master was entitled to retain all paid him, though he did not earn his return freight from Marenham to Liverpool. 4 Maul. & Sel. 37, 47, *De Silvale v. Kendall*, cotton 2½ per pound freight.

4 East 34, 52, *Thompson v. Rowcroft*.— See 3 Bos & P. 479—5 East 288; See *M'Carthy v. Abel*, *Sharp v. Gladstone*, *Ker v. Osborne*.

§ 9. *Assumpsit*, by an underwriter against the assured, for freight received after an abandonment, in one of the Russian cases in 1800, 1801, voyage from Portsmouth to Riga. The ship-owner first insured his ship with A, and his freight with B, and being notified of an embargo at Riga, abandoned the ship to the underwriters thereon, and the freight to the underwriters on that, and received from each a total loss first engaging on each policy to assign to the insurers respectively, his interest in the ship and freight, and to account accordingly. Afterwards the ship was liberated and earned her freight; this was received by the assured, the deft. Held, he was liable, for he had received the freight from the shippers of the goods, and had expressly promised to pay it over to the underwriters on freight, who by the abandonment and payment of the loss of freight, had become entitled to it; and that without deducting the expenses of provisions, and wages, &c. which before the abandonment were charges on the ship-owner, and after that on the underwriters on the ship, who stood in his place. And the plt., by the judge's order, filed in this case the following statement: "This action is brought by the plt.

(who was an underwriter for the sum of £150 on the freight of the ship called the Theseus, insured on a voyage at and from Riga to Portsmouth, on which policy the plt. has paid a total loss, and the deft. has since received the freight insured,) to recover the sum of £150, with interest thereon, from the deft." The underwriters on the ship claimed this freight. This case was decided solely on the specific agreement between the plt. and deft. The policy on the freight was after that on the ship, but before she was abandoned. It was urged also on the deft's. part, that this detention by Russia was a capture, and not an embargo, therefore that it put an end to the contract for freight.

CH. 32.
Art. 2.



§ 10. *Assumpsit*. In this case the plt. contracted to carry the deft., his family, and luggage, from Demerara to Flushing in Holland, they to have the exclusive use of the cabin, for 2400 guilders; and within four days sail of Flushing the ship was captured and carried into England, as a prize, and libelled, and the cargo condemned. The deft. and family were set at liberty, at Plymouth, and their luggage restored to them. The proceedings as to the vessel were pending.

5 East 316,
324, Mulloy
v. Barker, A.
D. 1804.—
1 D. & E.
182.—2 Burr.
1018.

The court held, that however the question might be as to the plt's. right to recover passage money, on an implied *assumpsit*, *pro ratâ itineris*, if the ship were restored, yet, pending the process against her as prize, no such action could be maintained; for *non constat*, but that the ship might be condemned, and the freight be decreed to the captors. Passage money seemed to be viewed by the court as freight, "except for the purpose of lien."

It this case it was observed that, by the common law, the plt. cannot recover on a contract not performed, or partly performed; but that by the marine law it was otherwise; therefore in *Luke v. Lyde*, where the contract was covenants in a charter-party, the same was not performed, but being partly performed the marine law allowed a recompense for that part, and the courts of law have allowed *assumpsit* to be engrafted upon that law, to recover such recompense for part performance in regard to freight, seamen's wages, &c. The benefit recovered for, makes part of the original contract, and this *assumpsit* may be implied by the deft's. accepting what the plt. has done, in part performance, without requesting him to perform the residue, and thereby dispensing impliedly with his performing such residue, and without any fault or neglect of his.

§ 11. In this case the deft. bought of the consignee all the tar on board a certain Swedish ship, under two bills of lading, and by agreement between them, the consignee was to pay the freight. The deft. received from the master most of the tar;

6 East 622,
Sodergren v.
Flight.

CH. 33.

Art. 2.



and the consignee failed, not having paid the master his freight. And the court held, that he had a lien on the tar remaining in his possession, for the whole freight; and that a part in a boat tied to the ship, by his orders, was in his possession, though the boat was sent by the vendee; and that when the master delivered part of the goods, he only lessened his security, but retained his lien for his whole freight on whatever part remained in his hands; and he, in an action brought by agreement, recovered the whole freight accordingly.

7 East 24, 38,
Sharp v.
Gladstone.

§ 12. *The expenses paid by freight or not.* *Assumpsit* for money had and received, by the underwriters on freight, against the assured, who received the freight after he had abandoned, in one of the Russia cases 1800 and 1801. The facts were, the deft., owner of a *seeking* ship, in the Russian trade, insured ship and freight, with different set of underwriters, on a voyage home from Petersburg to Liverpool. After part of the lading was on board, and the rest ready to be shipped, the ship and cargo were seized by the Russian government, and the crew sent into confinement; on which the owner, the deft., abandoned ship and freight to the respective underwriters, and received as for a total loss. After some months the ship and crew were liberated, and returned home with her cargo, and earned freight, which the owner received from the shippers of goods. It was agreed the plt., an underwriter on freight, and who had paid a total loss, was entitled to recover something. The freight, the deft. received subject to certain expenses, and the question was what expenses.

The court decided, that the ship and freight were *salvage* to the different underwriters, after deducting the expenses, each set was liable to pay, each being in the place of its assured, as follows, to wit: The underwriters on freight having paid as for a total loss, were entitled to the benefit of *salvage*, "and the net salvage is that which remains of the subject matter, after payment of the expenses of saving it." First, the charges paid at Liverpool £901. 15s., 5d. on ship and cargo were not to be paid by either set of underwriters. Second, the insurance on the ship can be no charge on the freight. Nor, third, can the diminution of the value of the ship and tackle by wear and tear on the voyage home, be a charge on freight or ship. Fourth, the expense of putting the cargo on board at Petersburg, was clearly for the benefit of the underwriters on freight, so a charge on them, and to be deducted. Fifth, the expenses at Petersburg and Elsineur, as port charges, were to be apportioned on ship and freight. So, sixth, the wages and provisions of the master and crew £223. 6s. 11d. from the time they were liberated in Russia, till discharged in England, were to be so apportioned. So, seventh, their

wages while detained in Russia, £270, were so to be apportioned on the two sets of underwriters on ship and freight.

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§ 13. In this case a ship was chartered on a voyage from London to Dominico, and back to London, at a certain rate of freight on the outward cargo, and after delivering it at Dominico, the charterers were to provide her a full cargo homeward, at current freight. Held, that insurance by the owner of the ship on the freight at and from Dominico to London, attached while the ship lay at Dominico, delivering her outward cargo, and before any part of the home cargo was shipped, during which time she was captured by the French; the contract of affreightment being *entire*, and the risk on the policy having commenced. Hence the owner became entitled to his freight on the homeward cargo, though no part of it was shipped.

7 East 400,
Horncastle v.
Suart.

§ 14. When freight actually commences, as between ship-owner and freighter, see case of *Curling v. Long*, post, Ch. 40, a. 16, that is, the *ship's breaking ground*.

2 East 634.

§ 15. The plt. at Newcastle, shipped goods for London to B's order. Before they arrived, he failed, and refused to accept them; they arrived at C's wharf, where B's goods usually came. The plt. arrived to receive them himself, and held, he was liable to pay only freight and charges, and that C had no lien on them for a general balance B owed him for wharfage.

3 Bos. & P.
119, 128,
Richardson v.
Goss.

Declaration. In consideration the plt. had taken on board his ship the deft's. goods to carry to A, the deft. promised to pay the money due for freight and carriage of the same, on the delivery of the bill of lading; that it was delivered; by reason whereof the deft. became liable to pay a large sum, to wit, £20, for freight and carriage of said goods. Held bad, on special demurrer, as it did not appear any thing became due for freight on the delivery of the bill of lading. Causes assigned. 1st. Did not appear any thing became due on the delivery of the bill of lading. 2d. Did not appear the plt. carried the goods from London &c.; *prima facie* no freight is due till the goods arrive and are delivered.

2 Bos. & P.
321, 323,
Blakey v.
Dixon & al.

§ 16. Even an *inchoate* right to freight does not attach until the ship has broken ground. But see 13, where an exception &c.

1 Bos. & P.
634, *Curling*
v. *Long*.

§ 17. If a contract of freight and demurrage be entered into by deed, the plt. cannot declare in debt generally, and give the deed in evidence. But he ought to declare on the deed.

New. R. 104,
Atty v. Par-
ish.

§ 18. If A contract with B, to bring a parcel of corn from a certain foreign port; and on A's arrival there he finds the exportation of corn there prohibited; stays out his demurrage there, and returns in ballast; B is liable to pay freight, but not

3 Bos. & P.
296, n. *Bligh*
v. *Page*.—
Morgan v.
Ins. Co of
N. America,
4 Dall. 465.

СН. 33. demurrage, if A knew of the prohibition before he entered the port, though demurrage was allowed by the contract. This Art. 2. case is clear as to the demurrage, but quære as to the freight, —was only the opinion of one judge; the consignee is to get permission to land the cargo.

3 Bos. & P.
291, 302,
Touteng & al.
v. Hubbard.—
10 Co. 106.

8 Bos. & P.
191.—4 Rob.
Adm. R. 77.
—10 East
634.—1 Valin,
626, a. 7.

10 East 630,
636, Atkin-
son v. Ritchie.

12 Mass. R.
206, Cutts,
adm. v. Per-
kins.

§ 19, A British merchant chartered a Swedish ship on a voyage from London to Ponte del Gada, in the island of St. Michael, for a cargo of fruit, and the charter-party contained the usual exception against the restraint of princes, and the ship was prevented reaching that port within the fruit season, by an embargo the British government laid on Swedish vessels. Held, the Swedish owner could not entitle himself to freight, by proceeding on the voyage, after the embargo was taken off, against the British merchant, who, after the embargo was taken off, notified the Swedish master the fruit season was past, and it would be useless to proceed on the voyage. The court seems to have gone on the ground the embargo was in the nature of hostility by the British government, and as such act, it threw the loss on the Swede, and said, if the embargo had been laid by a foreign government, the British merchant had been bound to furnish the cargo, though out of season, and so to pay the freight. Swede deemed a party to the fault of his government.

§ 20. The plt., freighter, and deft., master of a ship of 400 tons, agreed, in writing, that she, being fitted for the voyage, should proceed to St. Petersburg, and there load from the plt's. factor a full cargo of hemp and iron, and proceed to London, and deliver the same, on being paid freight &c. The master took in half a cargo and sailed on a general rumour of a hostile embargo on British vessels, laid about six weeks after. Held, he was liable in damages to the plt. for short delivery of cargo, though the master acted *bonâ fide*, and under a reasonable apprehension at the time.

§ 21. *Valid assignment of freight before earned. Assump- sit* by the administrator of S. P. Abbot to recover freight. Abbot was master and owner of the ship Rebecca, and in London bound to Boston with goods consigned to a merchant there. The deft., Abbot, owing a merchant in London, drew a bill in his favour on the said consignee in Boston for the amount of the freight money. Abbot died before the bill came to the payee, and when afterwards presented it was paid by the drawee. Held, this was a valid assignment of the freight, and the drawee was not liable to the action of Abbot's administrator, though his estate was insolvent. The defence was, that when the bill was drawn, no freight was due, but it accrued on delivery of the goods, and Abbot's death in the mean time was a revocation. But held, Abbot's liability

as drawer was complete by delivery of the bill to the payee, and an interest was coupled with an authority; so his death was no revocation, as it might have been, had the bill given only a naked authority to receive the freight of the deft. ; and in equity Abbot's estate had had the benefit of the freight, as he received it in London; the bill expressed the amount of the freight &c., see 4 D. & E. 343.

CH. 33.
Art. 2.

§ 22. *No demurrage where freight in lieu of it &c.* As where the owner of the ship agreed in writing with B. to carry certain goods in her from New York to Surinam, and bring back a certain cargo, and B agreed to pay \$2600 for freight, but if accident should prevent the delivery of the return cargo, then B agreed to pay only \$1300, and he engaged she should be at Surinam only thirty-five days to unload and reload. She remained there thirty-five days, and as the return cargo was not ready she staid twenty days longer at the request of B's agent and consignee, who, however, had no controul over the ship. She brought back the return cargo, and her owner received of B the said \$2600 freight. Held, in a suit for demurrage for the twenty days: 1. As the written agreement contained no stipulation for demurrage, and as no implied assumpsit to pay demurrage could arise from the act of B's consignee of the goods, he having no power to bind B as to demurrage, the ship owner, the plt., could not recover any demurrage of B. How freight contributes to general average, see 1 Maule & Sel. 318.

3 Johns. R. 342, 352, Robertson v. Bethune & al., or Boorman, Spencer J. dissented.

§ 23. *Pro rata freight.* The general rule is, that no freight is due, unless the ship arrives at her destined port: 2. There is no *pro rata* freight if she do not, unless the owner of the goods accept them at some intermediate place, and if he do, there may be *pro rata* freight. As where the vessel was by the perils of the sea driven into an intermediate port, and was there disabled to proceed, and the owner of the goods there accepted them. Held, that freight was due *pro rata itineris*, according to the part of the voyage performed when the disaster happened, which forced the vessel out of her course and into such port.

2 Johns. R. 323, 89, Robinson v. M. I. Com., and 336.—5 East 316.—2 Burr. 882.

Part of the goods lost, proportion of freight accordingly. A hundred and ninety hogsheads of sugar were shipped on freight at Surinam to be delivered at New York. In the passage the ship leaked by reason of tempestuous weather; fifty hogsheads were washed out, so that the fifty casks were empty and some fell to pieces; 140 hogsheads were delivered to the consignees. Held, freight was due only on the 140 hogsheads, none for the empty casks, the sugar being viewed as lost by the perils of the sea.

2 Johns. R. 327, Frith v. Barker.

CH. 33.
Art. 2.

2 Johns. R.
336, Scott v.
Libby & al.
2 Burr. 882.—
7 D. & E. 381.
—2 Cain. 13,
21.—1 Wash.
211; Ch. 33.

§ 24. *No freight*, where the port is blockaded and vessel turned away—charter-party dissolved. A vessel was chartered for a voyage from New York to the city of St. Domingo, and back to New York, for an entire sum the whole voyage, to be paid in sixty days after her return to New York. In sight of St. Domingo, then blockaded, she was turned away by a British cruiser, and she returned to New York with her outward cargo. In trover for the goods, held no freight was due. The goods were not transported so as to earn freight; and all but one voyage.

2 Johns. R.
352, Barker
v. Cheriot.—
Abbot 266.—
8 D. & E.
269.—Beawes
126.

On a like charter-party to Martinico and back, for an entire sum of \$4500 to be so paid. The vessel delivered her outward cargo, and returning with her return cargo was captured and carried to Antigua, libelled and detained for further evidence subject to the *lien* of freight. She returned to New York without the goods, except a very few; goods restored on further proof—but no goods or proceeds came to the owners or underwriters. In *assumpsit* for freight, held, none was due, [346, the assured had not an insurable interest] and no acceptance of the cargo by the owner to make a *pro rata* freight.

§ 25. *Full freight is due if the goods be delivered, though spoilt.* See *Griswold v. New York Insurance Company*, and if part shipped, 1 Maule & Sel. R. 313.

2 Johns. Ca.
443, United
Ins. Co. v.
Lenox.

§ 26. A ship is abandoned and the insurer accepts the abandonment, and afterwards the voyage is performed and freight earned; he is entitled to it, earned after the event, the cause of abandonment, or *pro rata*, 1 Johns. Ca. 377; 1 Cain. 578; 3 Cain. 16, 251.

3 Johns. Cas.
93, Herbert v.
Hallet.

§ 27. *Insurance on freight is not recoverable when not earned.* As where insurance was on freight from New York to Havanna; the vessel was stranded at Sandy Hook in a gale, but in three or four days returned to New York, and the cargo being unladen and considerably damaged was brought also to New York, and delivered to the several shippers. She was repaired in a fortnight at about \$120 expense, and soon after the plt. sent her on a different voyage. Held, 1. The plt. had lost his freight by his negligence, by not insisting to carry on the goods so as to entitle himself to it: 2. As he had thus lost his freight he could not recover his insurance on it, and hence the underwriters were not liable.

5 Johns. R.
262, Mum-
ford v. The
Commercial
Ins. Com.

§ 28. *Where extra freight must be paid by the underwriter on goods captured and restored.* In this case the insurance was on goods captured in the voyage, and vessel released, and goods finally restored, paying full freight, and the owner was obliged to hire another vessel to carry them to their port of destination and pay this *extra* freight. This it was adjudged

the underwriter was bound to pay, as an expense necessarily occasioned by the capture he insured against. CH. 33.
Art. 2.

§ 29. Freight is earned where the cargo is carried on contract to a foreign port, and there offered to the consignee, but not allowed by the government there to be landed, and is therefore brought back and the assured in a policy on freight cannot recover for a total or a partial loss. 4 Dallas 455.

§ 30. Underwriters on freight are liable for the extra expenses of seamen's wages and provisions during an embargo; and the jury may find damages for a *partial* loss, though the plt. in his declaration claim for a *total* loss, and no abandonment is shewn. 4 Dallas 246,
283.

§ 31. Policy on freight of the ship *Stranger*, at and from London to Jamaica, with liberty to touch at Madeira, and discharge and take goods on board there; and the freighter agreed to pay £135 in full for freight from London to Madeira, and from thence to Jamaica, to be paid in Madeira on delivery of the goods there shipped in London for Madeira, by Madeira wine at £40 a pipe, to be carried in the ship to Jamaica free of freight. She arrived at Madeira, and there delivered all her London cargo, except thirty-three casks of coals, which the master kept on board to stiffen the ship. Having received part of his cargo for Jamaica, but not the wine to be paid for freight, he was driven to sea by a gale of wind, where he was captured. Held, a total loss; and the plt. entitled to recover for his whole insurance on his freight; by an accident, the gale, &c. it was rendered impossible for the captain to receive his freight, one gross sum at Madeira, therefore he ought to recover it of the underwriter. New R. 236,
243, Atty v.
Lindo.

§ 32. To insure freight one must disclose his true interest in the ship. A chartered his vessel on a voyage on which she was about to sail, and in this situation A sold her to B, and in his name she was registered; but they agreed A should have the benefit of the freight of that voyage. B insured her as owner for the voyage, and A got insurance on the freight of goods on board for the same voyage, but A did not disclose the agreement between him and B, nor the peculiar nature of A's interest to the underwriter. Held, A had no insurable interest so as to be insured under the name of freight without disclosing its peculiar nature. 7 Johns. R.
522, Riley v.
Delafield.

§ 33. Freight agreed for is not transferred when the vessel is sold. As where a charter-party of affreightment was entered into, to pay freight to the owner of the ship for the hire of her, and the owner sold her during the voyage. Held, the freight was not transferred to the vendee, and when the owner became a bankrupt, held, his assignees, and not the vendee, had the legal right to the freight and demurrage due from the 10 East 279,
Splidt & al.
assignees, v.
Bowles & al.

CH. 33.
Art. 6.

10 East 378,
396, Hunter
v. Prinsep,
many cases
cited.

freighter upon the charter-party. The charter-party is a personal contract to pay the freight and demurrage to the contractee, and not by law assignable.

§ 34. *The freighter may waive the tort and recover the proceeds of his goods sold without orders, in assumpsit, &c.* As where in a charter-party, freight was to be paid at so much a ton, on a true delivery of the homeward cargo from Honduras Bay to London. The ship was captured and re-captured, and afterwards was wrecked at St. Kitts where the re-captors carried her. A sale of the cargo was ordered by the Vice-Admiralty Court there on the master's application, acting *bonâ fide*, but without orders from any, and the proceeds of the sale were remitted to the ship-owners (defts.) Held, the freighter in assumpsit for money had and received might recover such proceeds, without allowing freight *pro rata itineris*; for this form of action for the proceeds of goods illegally sold, is only a waiver of any claim for damages for the *tortious* act, taking the actual proceeds of the sale as the value of the goods, (subject to the legal consequences of considering the demand as a debt which admits of a set-off &c.) but does not recognise the right of the vendor so to convert the goods, and here the act of *conversion* (for such it was) being made by the master who is the general agent of the ship owners, was illegal, and discharged the claim of the ship owners for freight *pro rata itineris*.

1 Cranch 214,
238, Hoee &
Co. v. Gro-
verman, in
error.

§ 35. The principle settled in this case was, if the master or the owner of a vessel let on freight, sails into a port in obedience to the orders of the freighter's agent, which orders the master is not bound to obey, the owner remaining such in the voyage, and the vessel is seized in the port, and long detained by a foreign government as the property of its enemy, the freighter is not held to pay demurrage during the detention, though he would have been held if the vessel had been there detained by his act, by the terms of the charter-party.

2 Maule &
Sel. R. 303,
620, Moor-
som v. Hy-
mer.

§ 36. Ship is chartered out and home for a specified time, at a certain rate of payment on the return cargo in full for the whole time, to be paid part on her first sailing, and the rest on her return, by bills to be payable at a future day. On loading the return cargo a bill of lading was signed to deliver it to the charterers or their assigns, paying freight for it as by charter-party. Held, endorsees of the bill of lading for valuable consideration were not liable to the ship-owners on an implied promise to pay the freight.

ART. 3. *Neutral's freight in cases of capture and recapture.*

§ 1. It is clear the neutral carrier cannot have *assumpsit* or other action at common law, to recover his freight and expenses, or either, from those who capture or recapture him,

at least till ascertained and decreed in the admiralty ; as his freight, if due from them or not, depends wholly on the law of nations and of war. In these cases the first material question is, has he a right to receive his freight, or his freight and expenses from his captors or re-captors ; or has he forfeited this right by some misconduct in violating some law of nations, or of war, some treaty, or some municipal law, which gives them a right to say to him, you have forfeited your freight, because you resisted search, or because you rose on your captors, or rescued, or attempted to rescue, your vessel from them, or because you have carried, or attempted to carry, contraband goods to our enemies, or because you have violated, or attempted to violate, our blockade of his ports, or because you have furthered, or attempted to further, his views and interest, and the evidence is, he protects you by his license or passport, or because you have knowingly violated our non-intercourse, non-importation, or embargo laws, our laws, orders in council, or edicts, restraining trade, justly with our enemies, or because you sailed under their convoy, &c. &c.

CH. 33.

Art. 3.

But it is a settled and agreed case, that the fair neutral carrier, when captured or recaptured, by a belligerent and carried into his port, is entitled to receive his freight in all cases, and his expenses in some, from him, and when, in no wise forfeited. The belligerent seizes his enemy's goods in the neutral's vessel, *cum onere*, and acquires only his enemy's title and interest, his goods subject to freight and charges.

The second material question is, how shall the neutral carrier recover his freight and expenses from his belligerent captors. The answer is plain. He must proceed in the admiralty, and prize court, which exclusively judges of the legality or illegality of captures ; if legal or not, by the law of nations, of which the admiralty courts alone can judge, or can administer, in cases of captures. However, after his freight and expenses are ascertained and decreed, by the prize or admiralty court definitively, he then may perhaps have *assumpsit* or other action grounded on its decree to recover, as that conclusively settles the right of property, as in *Cabot v. Bingham*, and *Gelston v. Hoyt*, and other cases stated in other parts of this work.

§ 2. In the war between Great Britain, France, Holland, &c. in 1782, a British privateer, David Smart commander, seized as prize a Danish neutral ship, Hyde master, bound from Surinam to Amsterdam, laden with surgar &c., enemy's property, and carried them to London ; and November 1782, Smart libelled them in the admiralty &c. Wolf & al., Danish subjects, claimed ship and cargo, as being neutral. In

3 D. & E.
323, 348,
Smart & al.
v. Wolf.

CH. 33. December 1782, the judge restored the ship to the claimants, Art. 3. Wolf & al., as the property of Danish subjects, and ordered the cargo to be unladen, reserving the consideration of freight, expenses, &c.; May 1783, the judge restored to the master &c., their adventures, and "gave the master his freight and expenses to the time of the first decree, and directed further proof as to the cargo; November 1783, part condemned. There were many further proceedings, out of which certain questions arose, and a prohibition moved for to the admiralty, wherein the court of king's bench held, 1st. That the admiralty court has jurisdiction over all questions of freight, claimed by a neutral master against a captor, who has taken the goods as prizes. 2d. That a monition having issued after the goods were condemned, and decreed to be delivered to the captors, at the suit of such master, against the plts., as owners or agents of the prize goods, to bring into court the produce remaining in their hands, to answer to the freight, the king's bench would refuse the prohibition. 3d. Though no fide-jussory caution had been taken before the goods were delivered to the captor, but the question of freight had been reserved by the terms of the decree for future consideration.

In this leading case in addition to the general principles above laid down, we may further collect from the opinions of the several judges, 4th. That "the admiralty alone has jurisdiction not only over the question of prize, but of all its consequences," all its incidents. 5th. When the admiralty sees the neutral master has done nothing to forfeit his freight, it may well decree it to him. 6th. That so is the practice if he has violated no treaty, or the *jus gentium*, or has not refused search, or to shew his papers, or has not carried contrabands to the enemy, or has not violated other laws &c., which would forfeit his privilege as a neutral subject. 7th. If the prize court of admiralty take a stipulation for the return of goods to it, delivered out of its custody, yet it can also issue its monition to the possessors to bring in the goods themselves to answer freight, or for other purposes, especially if the goods have only changed hands, and the right of property has not been changed in *market overt* &c. 8th. "A court of common law cannot take cognizance of such freight; it involves in it the question of prize, or whether or not the goods are contraband, and many other questions, which depend on the treaties made with foreign powers, of which this court knows nothing, but all which must be subject to the decisions of some forum, governed by the same rules in all countries." 9th. The municipal laws of this country are not the laws by which other countries are governed. 10th. Courts of admiralty are instituted in all civilized countries, and found their determinations on the

same general code of laws. 11th. The stipulation is only a cumulative remedy, and does not supersede the jurisdiction *in rem*, though the possession of the goods has been parted with. 12. A man does not give up his *lien* when the law compels him to give up the possession. 13th. If the court did wrong in giving costs and expenses, the only remedy was by appeal. These principles have been recognised by near all the important decisions on the subject the last fifty years in England and the United States. See many authorities collected, 2 Wh. App. 53 to 56; many cases in this work, Ch. 40, Insurance; Ch. 227, Captures; Ch. 224, Seizures &c.

CH. 33.
Art. 8.


§ 3. The freight allowed however is not always that originally agreed on, but usually a reasonable freight. The ship is not discharged till the goods are unloaded, but is when they are, and she then cannot be retained to carry the goods elsewhere, if restored; the separating being by order of court, then the whole freight becomes due, 6 Rob. 231; 1 Rob. 289; 1 Edw. 72. As it is lawful for a neutral to make voyages from one enemy's port to another, he is entitled to his freight, when captured in such voyages, and carrying goods on freight, if his conduct be fair, but if not so, and he conducts fraudulently, and violates belligerent rights, he loses it, and in flagrant cases forfeits even his vessel. He always loses his freight if he uses false papers, or carries contrabands, and if there has been a spoliation of papers. So where his ship causes the seizure. Letter of Sir William Scott and Sir J. Nichols to Mr. Jay, A. D. 1794. 1 Rob. 198, 219, 237, 286, 288; 3 Rob. 188, 595; 4 Rob. 169, 183, 199; 1 Gallis. 513; 2 Rob. 101, 128, 299.

2 Wh. App.
53, 54.—
1 Wh. 159.

2 Rob. 104.

§ 4. Appeal from the Circuit Court in Massachusetts. A Swedish neutral vessel April 1814, on a voyage from Ireland to Spain, was captured by an American privateer. The cargo of the Swedish vessel was provisions, enemy's property, and the growth of the enemy's country, and she was specially allowed to carry them from Ireland to Spain, for the supply of the enemy's force in Spain, then in amity with the United States. The permission or license was the enemy's; and the Swede gave security so to carry them. Held, he was not entitled to freight. 2d. Had these provisions of enemy's growth been neutral property, they had been contraband by reason of the use to be made of them. 3d. *Aliter* had they been Swedish property, and of Swedish growth, and destined for the general supply of human life, though in an enemy's country. 4th. The neutral carrier of contrabands never has freight when captured; the Swede was, in fact, supplying the enemy's army by contract, and it made no difference, it being in Spain. [See the *Julia's* case, Ch. 224, a. 9.] In this case of the

1 Wheaton's
R. 382, 407,
the Commer-
cen.

CH. 33. *Art. 3.*  Commercen, the court was not unanimous. The Chief Justice, contra, pages 395 to 407; with him agreed Livingston, J., also Johnson J., on the ground Sweden was the ally of England, in the war against France, and that the Swede had a right to aid in it, though neutral in our war with England. This, it seems, was a new case in point of fact.

§ 5. A neutral forfeits also his freight, if he engages in the enemy's transport service, and conveys in it military persons or his despatches; these are hostile acts. 4 Rob. 256; 6 Rob. 420, 430, 440, 461. So he loses his freight if he engages in the enemy's coasting trade not open to the neutral, 1 Rob. 296. So in his colonial trade, confined to his ship, 2 Rob. 186, as to do this he must identify himself with the enemy; but not if only temporarily opened to him.

4 Rob. 279.— § 6. A belligerent captures an enemy's ship, carrying neutral goods on freight. The belligerent is entitled to the freight, and to receive it of the neutral, as the enemy's ship-owner would have been, had the voyage been terminated, *Consolato del Mare* 273, because on the principle stated above, the capturing belligerent succeeds to his enemy's right. The objection his right to freight does not accrue till the goods are delivered at the destined port, or he offers to carry them to it, applies to the neutral carrier when captured on his passage, and he is disabled to carry them to it; with this difference, the captor prevents his performing. The result of the cases is, such belligerent is entitled to freight only when the goods are carried to their destined port, or something is done equivalent, he has no *pro rata* freight.

3 Rob. 101, 180.—6 Rob. 231, 289. § 7. *Ships recaptured.* A ship was captured and recaptured on her return voyage. Held, she was entitled to her whole freight, salvage deducted, but the cargo being long disputed, she could not, in any reasonable time, carry it to its destined port; so if the cargo unloaded by its owners, or by order of court at another port; but denied, where a ship was captured on her outward voyage and recaptured, and brought back, even *pro rata itineris*.

4 Rob. 199, 336, 364.— 4 Rob. 90, 314, 278. § 8. Freight may be on a part of the goods restored, though a part be condemned as contraband after unladen; and if unloaded under a hostile embargo on neutral ships, they are discharged of the *lien* of the freight. If a capture be right, yet if the cargo be lost by the captor's negligence, they must pay it.

CH. 34.

Art. 1.

CHAPTER XXXIV.

ASSUMPSIT, AS TO GAMING CONTRACTS.

ART. 1. § 1. When contracts relate to *gaming*, it is often material to know when actions can or cannot be supported on them. These gaming contracts, so far as they are void, are chiefly so by the 9th of Anne, in England, and by a statute of 1786, in Massachusetts; and by various statutes in the other states. There have been many cases decided on the 9th of Anne, in England, tending to explain the act; but few have been decided on our act. But as our act is nearly in the *whole verbatim*, and in the *material parts verbatim*, with the 9th of Anne, any explanatory cases on that, are so on ours.

§ 2. By this act it is enacted, "that all notes, bills, bonds, judgments, mortgages, or *other securities, or conveyances whatsoever*, given, granted, drawn, entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for money or other valuable thing whatsoever, *won* by gaming, or playing at cards, dice, or any other game, or games, whatsoever, or by betting on the sides or hands of any person gaming, or for the reimbursing or repaying any money knowingly *lent* or advanced for any gaming or betting, or *lent* and advanced at the time and place of such play, to any person or persons so gaming or betting, or that shall, during such play, so play or bet, shall be void and of no effect." So far the 9th of Anne is *verbatim*, except in that act after the word dice, the words "tables, tennis-bowls," are inserted, but the sense is the same.

And in either act, if the securities be of real estate, they enure to the use of the persons they would, if the mortgagor, &c. were dead.

By the second section of our act, any person losing money or property, as above, and having paid, may in *assumpsit &c.*, to be brought in three months, recover it back, or damages; and if he do not *boná fide* sue in that time, any other person may sue for, and recover treble the amount, with costs in either case, &c.

By the third section, the winner may be indicted, and punished criminally &c. Like acts in most of our states, copied from said English act.

Debt on the gaming acts. Statute of N. York, (Sess. 25, c. 44.) declares horse-racing for money a nuisance, makes the stake-holder indictable, & all contracts &c. void. 10 Johns. R. 468, 469. Mass. act, March 4, 1786. See the acts of Virginia below. Laws of Me. ch. 28.

The act of N. York, against gaming was also copied nearly from the English act, 9 Anne, c. 14.

CH. 34. By the fourth section, the loser may recover on his own
 Art. 2. oath, unless the winner will swear to the contrary, and if he
 will, he recovers costs; but the plt. may, if he choose, proceed on common evidence.

By the fifth section, gaming, &c. in taverns and licensed houses, is prohibited; and the remedy on this section is by indictment.

The two acts of 9th Anne and of Massachusetts of March 4, 1786, are not alike, except in regard to the first section in each. The colony law of 1646, also, forbids *dancing* in taverns.

ART. 2. Questions and cases on the said first section. The questions may be ranked in two classes: First, What is a *game* within the provision? Second, What kind of contracts are void?

§ 1. What other game or games.

2 Wils. 309,
 Blaston v.
 Pye, cites 2
 Stra. 1118.,
 Goodburn v.
 Morley.—
 2 Wils. 36, 40,
 Lynall v.
 Longbotham.
 —1 Wils. 220.

It was decided in this case, that *horse-racing* was within the words of the 9th of Anne, ch. 14; and that monies betted and won therein, could not be recovered in *assumpsit*, brought upon a wager of 14 guineas to 8, by the plt. with the deft. on two races to be run by two horses; and as the wager was void as to the 14 guineas, being above £10, so the court held it was void as to the 8 guineas. And the court said, "they ought to extend the 9th of Anne to prevent excessive betting upon all *sports*, as well as games; and that although horse-racing is not mentioned in that statute, yet it is within the general words, *other game or games*." 2 Bos. & P. 130, *Shirley v. Sankey*.

Cowp. 281,
 Brown v.
 Berkely.

§ 2. So a *foot* race is a game within the act; and it makes no difference if the race is against *time*, and by *one* person alone. The bets or wagers were, if A could run so far in such a time. The wager having been paid, the action was brought to recover back the money; and it was ruled that it must be laid and proved the third person was *playing* at a game called a foot race. It has been said that the statute of 16 Ch. II. ch. 7, names both *horse* and *foot* races; and that the 9th of Anne has reference to this act of Charles. So cricket is within the act, 2 Ch. Pl. 76.

Jeffreys v.
 Walter.

Salk. 344,
 Pope v.
 St. Leger.

§ 3. But a wager concerning the *right manner* of playing, is not within the statute. As at backgammon, if one stir a man, a wager is laid, whether he is obliged to play it or not. The acts forbid gaming, not wagers as to the mode of gaming.

2 Bac. Abr.
 619.—6 Mod.
 13, Walker v.
 Walker.—

6 Mod. 128,
 Smith v.

Aury. Same 3 Salk. 14.—3 Salk. 175.

§ 4. At common law, playing at cards, dice, &c. innocent-ly practised as a recreation, was deemed lawful; but it has been held that a general *indebitatus assumpsit* lies not for money won at play, but that it lies against him who holds the

wager. But it was decided that for money so won, *special assumpsit* lies; for there is no debt or consideration—*no quid pro quo*; but only promises on which neither debt nor *indebitatus* lies. 2 Ld. Raym. 1034; 1 Ld. Raym. 69, Bovy v. Castleman. CH. 34. Art. 3.

§ 5. *Assumpsit for a bet*; and held that betting at a horse-race to above £10, is within the 9th of Anne; and if the bet be illegal on one side, and legal on the other, neither can be recovered for want of mutuality. A *voidable* contract, as an infant's &c. may be the consideration of another contract, but not a *void* one. 2 Bl. R. 706, 708, Clayton v. Jennings.

ART. 3. *What contracts as to gaming are void or not.* It is to be observed (however difficult it may be to see the reason) that the Massachusetts act, as well as the 9th of Anne, makes the *security only*, and not the *contract*, void.

§ 1. This was *assumpsit* on a bill of exchange drawn at Paris by Bland, on himself, in England, for £672, payable to the plt. 2d count for £700 lent and advanced; 3d for £700 monies had and received. Plea, the general issue. This bill was drawn for £300, the plt at Paris *lent* to Bland, at the time and place of play; and for £372 more *lost* at the same time and place, by Bland to the plt. at play—the play was fair. In this case the court decided, 2 Burr. 1077, 1088, Robinson v. Bland. Same case, 1 W. Bl. 234.

First. That the bill must be governed by the laws of England, where it was *to be paid* by the drawer himself, being drawee.

§ 2. Second. That the bill was a *security*, and void, being for a *gaming* debt, and the *consideration examinable*.

§ 3. Third. That no action lay for the £372 *won*; as to that the contract is void.

§ 4. Fourth. The plt. recovered the £300 *lent* as above, as being entitled to it, by the laws of England and France; and interest from the time the bill became payable.

§ 5. Fifth. Also held that the security being void, this might be pleaded or given in evidence.

The statute does not avoid the contract. As where the plt. rode his mare to the debt's. and proposed to him to toss up for her against two horses of the debt. This was done, the mare then being in the debt's. stable, and he won; and the plt. said she was fairly won, and returned home, leaving her in the debt's. possession; where she remained to the time of the trial. She was worth £25. The action was not brought till above three months after the tossing up. Judgment for the debt., and the court said there was no clause in the act that avoided the contract. It is only liable to be defeated *sub modo*; for which purpose the plt. must bring his action in a limited time; the plt. is too late. There appeared to be no doubt but that this was gaming within the acts. 2 Bos. & P. New. R. 416, 416, Vaughan v. Whitcomb. —2 Wils. 309. Alcinbrook v. Hall.

CH. 34.

Art. 3.

2 Burr. 1077,
Robinson v.
Bland.

§ 6. It was further decided in *Robinson v. Bland*, that, Sixth. There is a distinction between the contract and security.

"If part of the contract arise on a good consideration and part on a bad one, it is divisible; but it is otherwise as to the security; that, being entire, is bad for the whole: hence,

§ 7. Seventh. Though the security was void, the contract remained, and the plt. might recover the money lent—the legal part.

§ 8. Eighth. A distinction was taken between monies lent to *play with*, and monies lent at the *time and place of play*. The purpose in the first case is bad, but may not be so in the last. Quære, as it appeared to the court that the plt. took a bill, an *express written contract*, for the £300 lent, and that was void, how, on the many late authorities, could he resort to his legal or *implied assumpsit*, when it was proved a written contract existed?

Rawden v.
Shadwell,
Ambler 269.

1 Salk. 344,
Hussey v. Jacob,—12
Mod. 97, the
same case.—
6 Mod. 170,
178, pleas at
large.
2 Stra. 1155.
Bower v.
Brampton,
cited 1 Esp.
28.

§ 9. In this case it was decided, that if money be won at play, and a bill be drawn and accepted for it, the *winner* shall not have an action against the acceptor; but the *innocent endorsee* may. This was the law formerly, but the law is now altered, therefore,

§ 10. It was held in a later case, that where a promissory note was given for money lent to the deft. *knowingly to game with*, by one Church, who endorsed the note to the plt. for a valuable consideration, it could not be recovered, the 9th of Anne having made the *security void*. So are the late cases; for where a statute expressly declares a security null and void, as this gaming act, or the statute of usury does, the decisions thereon, in late cases, have been uniform, that the security is void in the hands of an innocent endorsee; for where the security is made actually void by statute law, the endorsing it over can never give it a new binding force.

Dougl. 636,
639, Lowe v.
Walker.

2 Stra. 1243,
Barjeau v.
Walsmley.

§ 11. In this case the plt. and deft. gamed together at *tossing up* for five guineas a time. The plt. won all the deft's. ready money, then lent him ten guineas a time till he had borrowed 120. Ruled, that this was not a case within the 9th of Anne, for the word contract is not in the act, and securities in it must mean lasting *liens* on the estate.

Judgment for the plt. on the contract, not on the security; but contrary to the 8th rule above in one respect was this decision, for the money was lent to play with, not merely at the time and place of play.

12 Mod. 268,
Walker v.
Walker.

§ 12. It has been adjudged, that on special mutual promises actions will lie for money won at play. This must be on the above distinction between contracts and securities, the last being void by the act, not the first.

§ 13. If the plt. lose money at play and pay it to deft., and do not sue to recover in the time prescribed by the act, he never can recover it back, for the plt. is *particeps criminis*; both parties are equally in the wrong, and then the rule applies, *melior est conditio possidentis*. So was the Roman law. The rule of that law was, that if an agreement be dishonest, both in respect to him that gives and him who receives, the first cannot require any thing again, because in this case the possessor has the advantage.

CH. 34.
Art. 3.

Pow. on Con.
201.—2 Burr.
1012.
Dig. lib. 12,
tit. 6.

§ 14. So money paid on a gaming policy cannot be recovered back on the same principles. So a bribe paid cannot be recovered back, for both parties are equally criminal.

Dougl. 466,
Lowry v.
Bourdieu
Pow. on Con.
203.

§ 15. The new French code generally, disallows any action *aleatoire* or contingent; or when the advantages or losses either for all parties, or some one or more among them depend on an uncertain event, though it allows an action to enforce the contracts of insurance and bottomry, and as to annuities and bets, as to acts of dexterity and exercises. It does not allow actions to enforce generally gaming or wager contracts, and one good reason given is, that they lead men to trust in chance or fortune, and to neglect industry; and another, that they lead men to seek their own gain in the losses of others, and without any object useful to any party. But a gaming debt or wager actually paid, cannot be recovered back, if there be no fraud, overreaching, or unfair play. Here the old rule seems to be applied; that is, when the parties are in *pari*, the right of the possessor is the best.

The French
Civil Code
enacted 1806,
Book 3, title
19.

§ 16. *Assumpsit* to run a horse at such time as the plt. shall appoint, and he states he appointed a certain day named, and held good.

3 Salk 345,
Scott v. Hog-
son.

§ 17. Leave given to compound a prosecution for gaming. Prosecution was on the statute.

1 Wils. 180.

§ 18. The action of debt given to the loser of money at play, by 9 Anne, c. 14, is given on the ground of contract, not by way of penalty. And hence the deft. may be holden to bail; and deft. may plead in abatement, that the money was due from others not named, as well as from the deft. Hence also, right to sue is transmissible to the assignees of a bankrupt.

2 Stra. 1079.
—7 D & E.
257, Bristow
v. James.—
2 Hen. Bl.
308, Brandon
v. Pate.

§ 19. *Form of declaring &c.* The form. A declaration in *assumpsit* is given by the statute only to the party losing, but it gives no form of declaring, where a common informer sues, and in an action founded on the statute the plt. must state specially the cause of action arising under it. There is no contract or privity between such informer and the offender; see the case of *Frederick v. Lookup*, 4 Burr. 2018, 2022; the

4 Johns. R.
193, 199,
Cole q. t. v.
Smith. See
Ch. 137, s.
13, s. 6.

CH. 34. form of declaring by such informer, of the verdict, and judgment.
 Art. 4.

Woodson &
 al. v. Barrett
 & al. 2 Hen.
 & M. 80, 89.

ART. 4. *Law against gaming in Virginia, and gaming debts.* In this case it was decided, a gaming bond was void in the hands of an assignee for valuable consideration, and without notice; that a judgment thereon was also void, as was likewise a levy by execution thereon in the form of an *elegit* and appraisal by jury, and thereto there ought to be a perpetual injunction. The case was thus, Woodson, at gaming at cards in 1783, lost to one Miller £1400 in officers' certificates, and he about the same time lost to one Jouitt about the same sum. Miller requested Woodson to pay Jouitt that sum, and Woodson gave his bond to Jouitt for that sum; Jouitt at the time knowing it was for a gaming debt. This bond was afterwards assigned to Barrett & Co. for a valuable consideration, and without notice that it was for gaming. The assignees got judgment at law in a county court against Woodson, and a writ of *elegit* issued against his lands &c.; half of them were levied on by the jury, valuation &c. The assignees sued the sheriff for a defect in the levy in the Richmond District Court, and recovered, to all which an injunction was issued. By a bill for it the cause was carried into the then High Court of Chancery, the judge in which decided the bond was valid &c. Thereon Woodson & al. appealed to the Supreme Court of Appeals, which decided the bond was by the statutes of Virginia absolutely void *ab initio*, and so void in the hands of the assignees, and that the judgment and all done thereon was void.

The Acts of
 Virginia. A.
 D. 1748, c.
 25, and Oct.
 1779, c. 42.

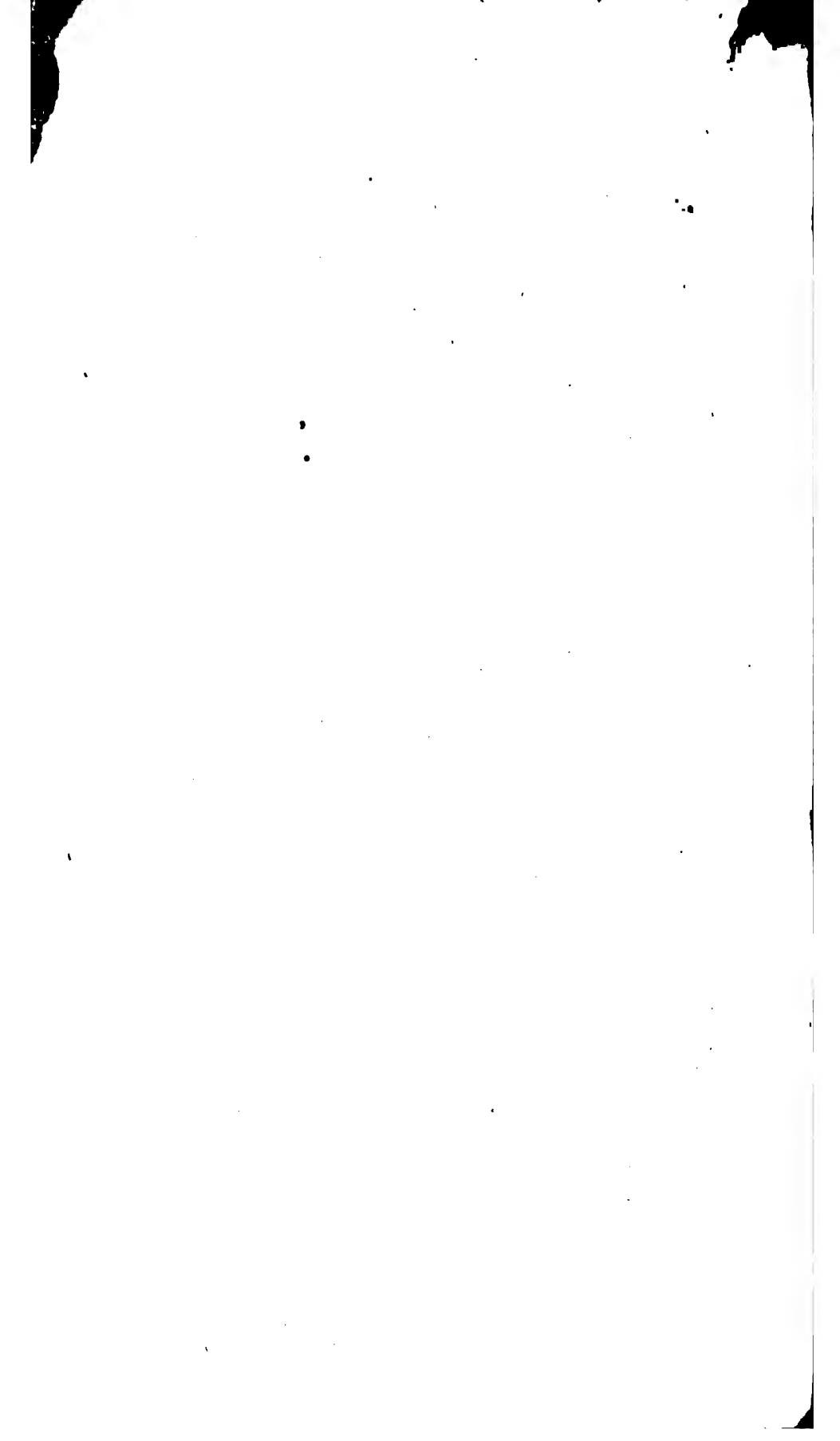
The acts of 1748 and 1779, made all promises, agreements, notes, bills, bonds, and other contracts, judgments, mortgages, or other securities or conveyances whatsoever, where the whole or any part of the consideration shall be for money or other valuable thing whatsoever won at gaming, or for the repayment of money lent to game with, utterly void, frustrate, and of no effect, to all intents and purposes whatsoever. Judge Tucker observed, that the word *contracts* in the above act is not in the 9 Anne; otherwise they are like that act, and the act above of Massachusetts which omits that word, on account of which omission a distinction was taken in *Robinson v. Bland*, which see Ch. 1, a. 3, s. 2; Ch. 34, a. 3, s. 16. In *Woodson v. Barrett* were also cited *Lowe v. Walker*, *Bower v. Brampton*, which are above cited; also *Bones v. Botheited*, Ch. 145, s. 14, were also cited from Washington's Reports, several cases, as *Ambler v. Wyld*, 2 Wash. 36; *Buckner v. Smith*, 1 Wash. 294; *Hoomes v. Smork*, 1 Wash. 389; *Cochran v. Street*, 1 Wash. 79; *Norton v. Rose*, 2 Wash. 233; *Peckett v. Morris*, 2 Wash. 255; shewing such a bond

void in the hands of such assignees, unless the obligor before the assignment induce the assignee to take the bond by promising to pay him the money ; also shewing, that if he pay a valuable consideration &c. he may recover back his money in an action of *assumpsit* ; and is not this his only proper action, for when the bond is absolutely void *ab initio*, how can the obligor make it valid by such an after promise ?

CH. 34.

Art. 4.

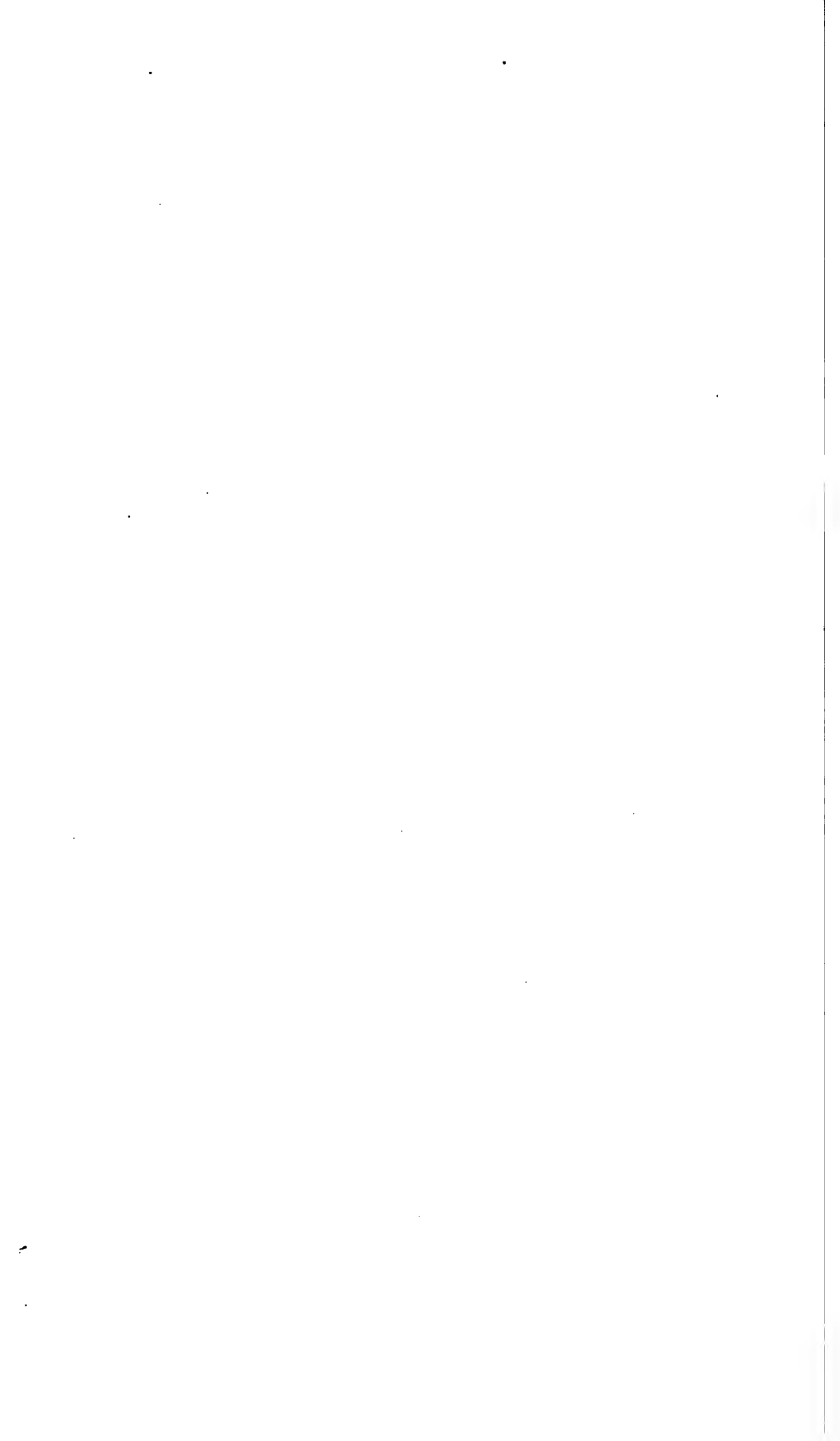
END OF THE FIRST VOLUME.



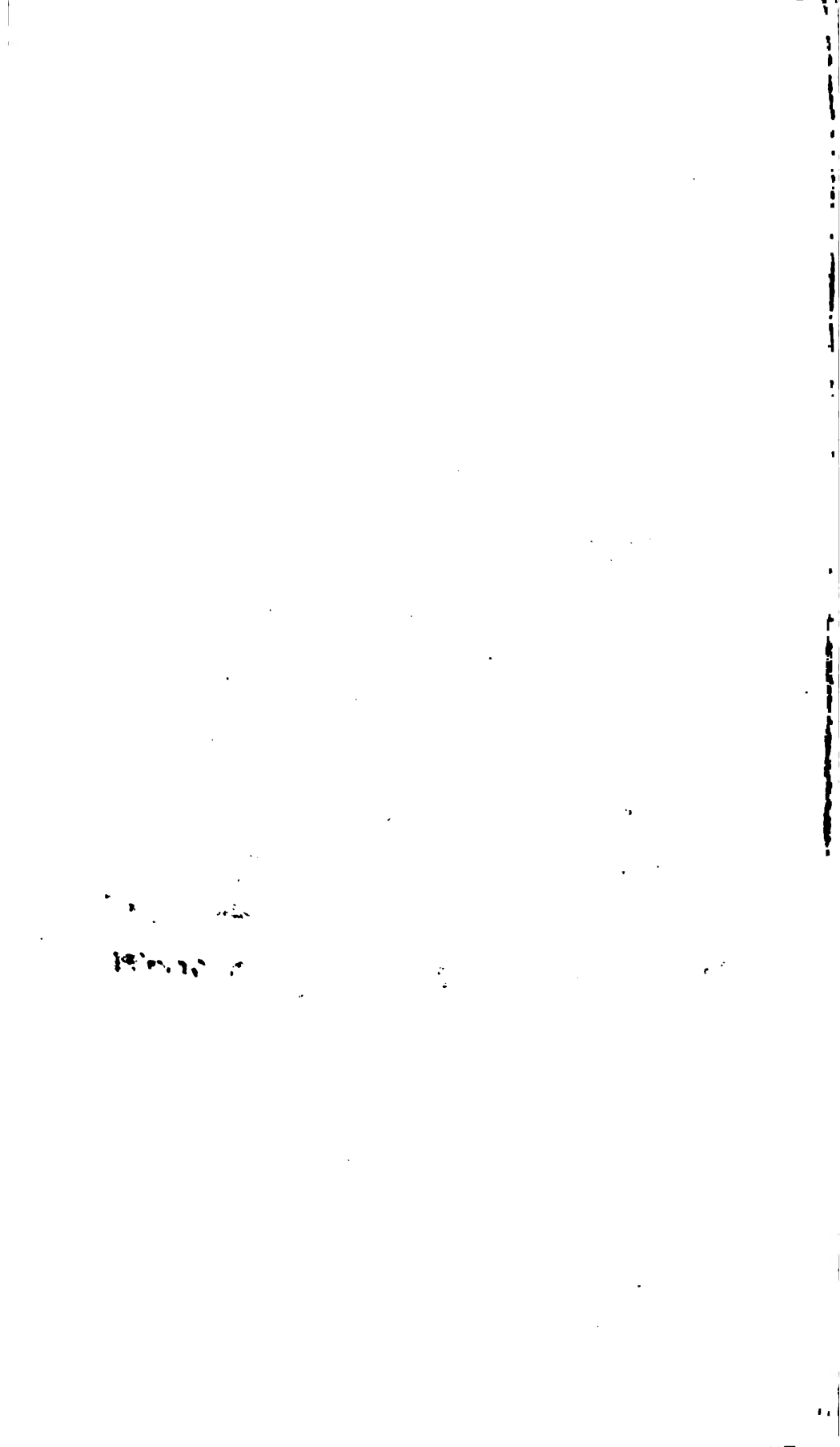


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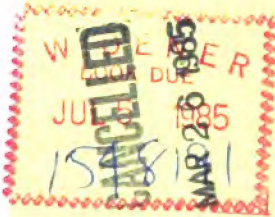








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